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In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an outer continental shelf lease sale that does not authorize any conduct having a physical impact upon the coast is a federal activity "directly affecting the coastal zone" within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1).

PARTIES TO THE PROCEEDING

This litigation was commenced by the filing of separate but virtually identical complaints by the State of California and various environmental action groups. Parties plaintiff included the State of California, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Several California political subdivisions intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey, then Acting Director of the United States Bureau of Land Management, and Robert Burford, then Director Designate and now Director, United States Bureau of Land Management. The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of

the Coastal States Organization and the States of Maine, Massachusetts, North Carolina, Florida, Alaska and Oregon.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-33a) is reported at 683 F.2d 1253. The opinion of the district court (App. B, *infra*, 34a-78a) is reported at 520 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982 (App. C, *infra*, 82a). A timely petition for rehearing was denied on November 10, 1982 (App. D, *infra*, 83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1):

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the

maximum extent practicable, consistent with approved state management programs.

Pertinent provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. IV) 1331 *et seq.*, are *reprinted in* App. E, *infra*, 87a-99a.

STATEMENT

Pursuant to Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(1), federal "activities directly affecting the coastal zone" are subject to the substantive requirement that they be conducted in a manner that is consistent "to the maximum extent practicable" with an approved state coastal zone management program. This litigation raises the question whether the consistency requirement of Section 307(c)(1) properly applies to an outer continental shelf (OCS) oil and gas lease sale conducted pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. IV) 1331 *et seq.*, when that sale has no physical impact upon the coast.

1. a. The Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, was enacted in 1972 to encourage the wise use of land and water resources of the coastal zone through the development and implementation of state management programs. 16 U.S.C. 1452.[1] Before a state management program becomes effective, it is approved by the Secretary of Commerce (Sections 1454(h), 1455(c)), who must insure that the views of the federal agencies principally affected by the state's program have been adequately considered (Section 1456(b)). Following approval of a state management program, the actions of federal government licensees

[1] Under the Act, the coastal zone includes coastal waters and adjacent shorelands with the exception of federal property. The zone extends seaward to the outer limit of United States territorial waters, normally three geographical miles from the coastline. 16 U.S.C. 1453(1). The outer continental shelf, by definition, lies outside the coastal zone and beyond the belt conceded to the states by the Submerged Lands Act of 1953. 43 U.S.C. 1301(a)-(b), 1331(a). In the case of California, like all other states bordering on the Pacific or Atlantic Oceans, the "coastal zone," like the Submerged Lands Act grant, extends three geographical miles seaward from the coastline. 43 U.S.C.. 1301(b). See *United States* v. *California*, 381 U.S. 139 (1965).

and permittees, as well as the activities of the federal government itself, must meet the consistency requirements of the Act (Section 1456(c)).

Section 307(c)(1) of the CZMA, 16 U.S.C. 1456(c)(1), requires that each federal agency "conducting or supporting activities directly affecting the coastal zone" conduct or support those activities "in a manner which is, to the maximum extent practicable, consistent with approved state management programs." Pursuant to Commerce Department regulations implementing this provision, federal agencies are required to prepare a document called a "consistency determination" for any activity that will have a direct effect upon a state's coastal zone (15 C.F.R. 930.34). The consistency determination identifies the direct effects of the federal activity and provides the state with an explanation of how the activity has been tailored to achieve consistency with the state program (Section 930.39).

Section 307(c)(3) of the Act, 16 U.S.C. 1456(c)(3), deals with the consistency obligations of federal licensees or permittees. Applicants for federal licenses or permits are required to supply consistency certifications for any "activity affecting land or water uses in the coastal zone." 16 U.S.C. 1456(c)(3)(A) and (B). The state is then given an opportunity to concur in the certification. If the appropriate state authorities refuse to concur, the federal agency from whom the license or permit is sought must reject the application. The state's veto of an applicant's consistency certification can be overridden by the Secretary of Commerce, however, if he finds that the applicant's proposed activity is consistent with the CZMA or is otherwise necessary in the interest of national security (*ibid.*).

b. The Outer Continental Shelf Lands Act was enacted in 1953 to authorize federal leasing of the outer continental shelf beyond the state territorial sea belt for oil and gas development (ch. 345, 67 Stat. 462). See note 1, *supra*. In 1978, Congress amended the OCSLA, Pub. L. No. 95-372, 92 Stat. 632, to provide for, inter alia, the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. (Supp. IV) 1332(3). The OCSLA, as amended, provides distinct stages

for federal decisionmaking concerning oil and gas activities on the OCS. The stages can be described as (1) preparation and leasing (Section 1337(a)); (2) exploration (Section 1340); and (3) development and production (Section 1351).[2]

The solicitation of bids and issuance of a lease constitute the first stage in the OCS development process. 43 U.S.C. (Supp. IV) 1337(a). Under the OCSLA, a lease entitles its holder to undertake only extremely limited activity without further federal approval. See 43 U.S.C. (Supp. IV) 1340(c) (approval required prior to exploration), Section 1351 (approval required prior to development and production). Regulations promulgated by the Department of the Interior provide that a lease merely entitles its holder to conduct "preliminary activities" on the OCS. 30 C.F.R. 250.34-1. These "preliminary activities" are defined as "geophysical and other surveys necessary to develop a comprehensive exploration plan" so long as such activities "do not result in any physical penetration of the seabed of greater than 300 feet of unconsolidated formations" and "do not result in any significant adverse impact on the natural resources of the OCS" (*ibid.*). More extensive activity is permitted only upon a lessee's compliance with the procedures and substantive requirements of the next stage: exploration.

Prior to commencing exploration activities, a lessee must submit a detailed exploration plan to the Secretary for approval. 43 U.S.C. (Supp. IV) 1340(c). The Secretary must disapprove a plan if it would likely cause serious harm or damage to life or property or to the marine, coastal or human environment. 43 U.S.C. (Supp. IV) 1340(c)(1). A lessee submitting a plan that affects any land or water use in the coastal zone of a state with an approved management program must also attach a certification that the plan is

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[2] Some provisions of the OCSLA apply throughout all stages of the OCS development process. Regulations promulgated pursuant to 43 U.S.C. (Supp. IV) 1334(a)(1)(B) provide for suspension or temporary prohibition of all OCS operations if "there is a threat of serious, irreparable or immediate harm" to life or the environment. 30 C.F.R. 250.12(a)(1)(ii). The regulations also provide for cancellation of leases if such dangers cannot be resolved. 43 U.S.C. (Supp. IV) 1334(a)(2); 30 C.F.R. 250.12(d)(4).

consistent with the state's coastal zone management program. 43 U.S.C. (Supp. IV) 1340(c)(2); 16 U.S.C. 1456(c)(3)(B). The Secretary may not grant any license or permit for any activity described in an exploration plan until the state concurs with the consistency certification, or a determination of consistency or necessity is made by the Secretary of Commerce. 43 U.S.C. (Supp. IV) 1340(c)(2).

If, following exploration, commercial quantities of oil and gas are discovered, the final stage under the OCSLA is development and production. As with the exploration stage, the lessee must submit a development and production plan to the Secretary for approval. 43 U.S.C. (Supp. IV) 1351(a)(1). The plan must be in compliance with the OCSLA and its implementing regulations, 43 U.S.C. (Supp. IV) 1351(h)(1)(A),[3] and must include a certification of consistency with the coastal zone management plan of any affected state. 43 U.S.C. (Supp. IV) 1351(d); 16 U.S.C. (Supp. V) 1456(c)(3)(B). Approval of development and production plans is contingent upon approval of the final consistency certification. 43 U.S.C. (Supp. IV) 1351(h)(1)(B).

2. On April 27, 1981, the Department of the Interior published a final notice of sale for Lease Sale No. 53, Santa Maria Basin (App. A, *infra*, 11a). The notice announced the Department's decision to offer 111 OCS tracts off central California for leasing under the OCSLA (46 Fed. Reg. 23678-23680 (1981)).[4] Two days later, on April 29, 1981, the

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[3] The Secretary will disapprove a development and production plan if exceptional geological conditions, marine or coastal resource values, or other exceptional circumstances dictate disapproval despite compliance with the OCSLA and its implementing regulations. 43 U.S.C. (Supp. IV) 1351(h)(1)(D).

[4] The Governor of California had previously recommended pursuant to Section 19 of the OCSLA, 43 U.S.C. (Supp. IV) 1345, that certain northern tracts in the Santa Maria Basin be excluded from the sale because they are "directly seaward of the habitat, breeding, and food supply areas of the Southern Sea Otter." C.R. 85; A.R. 224w, at 2 ("C.R." refers to the Clerk's Record, "A.R." refers to the Administrative Record). The Secretary of the Interior determined to lease the entire Santa Maria Basin, despite the Governor's objections, "based on a finding of overriding national interest" (App. A, *infra*, 11a; 43 U.S.C. (Supp. IV) 1345 (c)). The Fish and Wildlife Service, under Section 7 of

State of California filed suit seeking to enjoin the sale of 29 tracts in the northern portion of the Santa Maria Basin. A group of environmental organizations, led by the Natural Resources Defense Council, Inc., filed a substantially identical suit. The complaints alleged that the Department of the Interior had violated Section 307(c)(1) of the CZMA by failing to prepare a consistency determination for Lease Sale No. 53. Plaintiffs also contended that the sale of the contested tracts would be inconsistent with the state's coastal zone management program because of the possible effects of oil development on the sea otter.[5]

The federal government contended that it was not in violation of its obligations under Section 307(c)(1) of the CZMA because Lease Sale No. 53 did not come within the terms of the statute. The government relied upon former Secretary Andrus' administrative determination, reaffirmed by Secretary Watt, that the lease sale had no "direct effects" on California's coastal zone (App. A, *infra*, 10a). The Secretary concluded that Lease Sale No. 53 did not come within the sweep of Section 307(c)(1) because it had no physical impact on the coastal zone. Moreover, the potential effects of oil and gas exploration, development and production on the OCS are specifically subject to the separate consistency certification procedure set forth in Section 307(c)(3)(B) of the CZMA.

On August 18, 1981, the district court entered summary judgment for California and the intervening local governments on their CZMA claim.[6] The court ruled (App. B,

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the Endangered Species Act of 1973, 16 U.S.C. (Supp. V) 1536, had concluded earlier that the sale of the disputed tracts would not "jeopardize the continued existence of the sea otter" (C.R. 85, attachment to A.R. 204w at 13).

[5] In addition, California's and the environmental groups' complaints claimed violations of the National Environmental Policy Act of 196., 42 U.S.C. 4321 *et seq.*, Section 19 of the OCSLA, 43 U.S.C. (Supp. IV) 1345; the Endangered Species Act of 1973, 16 U.S.C. 1331 *et seq.*, and the Marine Mammal Protection Act of 1972, 16 U.S.C. (Supp. V) 1361 *et seq.* The district court resolved these issues in the government's favor (App. B, *infra*, 65a-78a). The court of appeals affirmed (App. A, *infra*, 25a-30a).

[6] The district court had previously entered a preliminary injunction that barred the Department of the Interior from accepting bids on the

infra, 62a-65a) that OCS Lease Sale No. 53 directly affected the coastal zone and the Secretary erred in not providing California with a consistency determination.[7] The court found that leasing directly affects the coastal zone because "leasing sets in motion the entire chain of events which culminates in oil and gas development" (*id.* at 46a). According to the district court, the "direct effects" of a lease sale include all the potential activities that might take place during the later stages of the OCS development process. For example, the court accepted the state's claim that the possibility of an oil spill at the development and production stage was a "direct effect" of the lease sale (*id.* at 63a). The court similarly concluded that all of the possible effects on the coastal zone listed in the Environmental Impact Statement (EIS) and the Secretarial Issue Document (SID) prepared in conjunction with the lease sale were direct effects of the decision to lease (*id.* at 63a-65a). The district court therefore held that the tracts disputed by the State of California could not be leased until the Secretary prepared a consistency determination addressing the steps taken by him to insure that the sale would be consistent with the state's coastal management program.[8]

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challenged tracts, although the court permitted the bids to be received and opened on May 28, 1981. Bids totalling approximately $220,000,000 were received on 19 of the challenged tracts in the Santa Maria Basin.

[7] The district court ruled that the environmental organizations "had no implied right of action to bring claims under the CZMA" (App. A, *infra*, 30a). On appeal, the court of appeals reversed, holding that such organizations had standing under Section 10 of the Administrative Procedure Act, 5 U.S.C. 702 (App. A, *infra*, at 31a). We do not raise standing as a separate issue in this petition because, as to this lease sale, the claims of the state and the environmental groups coincide. Because the state clearly has standing to pursue these issues, no live standing issue is presented. See *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981). We reserve the right to challenge the standing of non-governmental entities, including environmental organizations, in future CZMA cases.

[8] The district court's injunction also declared that the bids received on the disputed tracts were "null and void" (App. B, *infra*, 80a). The injunction was stayed pending appeal, and was ultimately modified by the court of appeals. As modified, the portion of the district court's or-

3. On appeal, the Ninth Circuit affirmed. It ruled that an OCS lease sale "directly affects" the coastal zone within the meaning of Section 307(c)(1) of the CZMA because it establishes "the basic scope and charter for subsequent development and production" (App. A, *infra*, 13a). To support this conclusion, the court of appeals adopted the district court's list of direct effects developed from the EIS and SID prepared for Lease Sale No. 53 (*id.* at 12a-13a). The court of appeals reasoned that California's expansive interpretation of Section 307(c)(1)'s "directly affecting" threshold standard served the purposes of the Act better than the government's "narrow definition" because an OCS lease sale is "the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased" (App. A, *infra*, 13a). Accordingly, it held that the Secretary of the Interior is required to prepare a consistency determination addressing all potential exploration, development and production activities prior to effectuating an OCS lease sale.[9]

REASONS FOR GRANTING THE WRIT

The court of appeals has effectively amended the federal consistency requirements of the Coastal Zone Management Act of 1972 by reading the term "directly" out of Section 307(c)(1) of the Act. The decision below subjects an outer continental shelf lease sale to CZMA consistency requirements, even though Congress in the 1976 Amendments to the CZMA and the 1978 Amendments to the Outer Continental Shelf Lands Act clearly provided for a contrary re-

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der that voids the bids on the disputed tracts is stayed pending the preparation of a consistency determination by the Secretary of the Interior (App. A, *infra*, 24a).

[9] The court of appeals held that the Secretary of the Interior must prepare a consistency determination for Lease Sale No. 53 (App. A, *infra*, 24a). The court declared, however, that federal activities directly affecting the coastal zone need not be "as consistent with [a state] plan as is *possible*" (App. A, *infra*, 19a) (emphasis in original). Rather, the Secretary "must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge" (*id.* at 22a).

sult. The court of appeals' expansive construction of Section 307(c)(1), moreover, may well impose CZMA consistency requirements on a plethora of federal activities only tenuously connected with a coastal zone. Because the CZMA places substantive limitations upon federal activities, in contrast to the procedural, informational requirements of the National Environmental Policy Act of 1972, 42 U.S.C. 4331 *et seq.*, the burden imposed upon the federal government by the lower court's overly broad reading of Section 307(c)(1) is both significant and unwarranted.

1. Section 307(c)(1) of the CZMA imposes consistency obligations only upon those federal actions "directly affecting the coastal zone."[10] The decision of the court of appeals, however, subjects an OCS lease sale to the consistency provisions of Section 307(c)(1) notwithstanding the fact that any impact of the sale on California's coastal zone is speculative, remote, and subject to further consistency review under Section 307(c)(3) of the Act. The court, in short, has accorded no meaning to the statutory term "directly." Instead, the court has made its own perceptions of public policy "determinative of the outcome" (*Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 220 (1980)), in apparent disregard of the statute actually enacted by Congress. While courts are not "'at liberty to imply a condition which

[10] Congress prescribed two discrete thresholds for the consistency limitations contained in Section 307(c) of the CZMA. Applicants for federal licenses or permits must comply with the consistency obligations of the Act if they are "to conduct an activity affecting" the state's coastal zone (16 U.S.C. 1456(c)(3)(A)). In contrast, the consistency obligations of the federal government are triggered only when government activities "directly affect [ ]" the coastal zone (Section 1456(c)(1)). Congress presumably intended that the term "directly affecting" in Section 307(c)(1) be given a different and more restrictive meaning than the "affecting" standard utilized in Section 307(c)(3). See generally, *Russell* v. *Law Enforcement Assistance Administration*, 637 F.2d 354, 356 (5th Cir. 1981); *Lankford* v. *Law Enforcement Assistance Administration*, 620 F.2d 35, 36 (4th Cir. 1980); cf. *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959). But, whatever the scope of the "affecting" standard in Section 307(c)(3)—an issue not presented here—it is clear that Congress pointedly qualified the trigger for consistency determinations in case of governmental activities by adding the word "directly" in Section 307(c)(1).

is opposed to the explicit terms of [a] statute,'" neither are they free to delete a condition from the explicit terms of a statute, for to do so "'is not to construe the Act but to amend it.'" *Fedorenko* v. *United States*, 449 U.S. 490, 513 (1981), quoting *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934). The court of appeals' construction of Section 307(c)(1) does not comport with the plain terms of the statute, its legislative history, or a functional analysis of its operation.

Although the district court dismissed the government's appeal to plain meaning as a "subterfuge" (App. B, *infra*, 59a) and the court of appeals eschewed any "narrow definition" (App. A, *infra*, 13a) of the statute before it, the fact remains that the conventional construction of the term "directly" is at odds with the conclusion of both courts. "The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307 (1936). See also *Webster's Third New International Dictionary*, (3d ed. unabridged 1971) ("without any intervening agency or instrumentality of a determining influence"). Far from having a proximate impact on the coastal zone, an OCS lease sale is "only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to * * * each [successive stage]." *North Slope Borough* v. *Andrus*, 642 F.2d 589, (D.C. Cir. 1980). While the possible impacts of oil exploration and production may be hypothesized at the lease sale stage of the OCS development process, these potential effects are remote in time from the OCS lease sale, depend upon the discovery of oil or gas on the lease site, and are preceded by a federal review procedure that includes a CZMA consistency determination. 16 U.S.C. (Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. IV) 1351. The effects of an OCS lease sale on the coastal zone, including the ones noted by the courts below (App. A, *infra*, 12a-13a; App. B, *infra*, 62a-65a), are clearly "indirect."[11] Thus, the

[11] This conclusion comports with regulatory language developed under the National Environmental Policy Act of 1969. NEPA regulations

plain import of the term "directly" requires reversal of the court of appeals.

The legislative history of Section 307(c)(1) also contradicts the court of appeals' conclusion that the statute applies to an OCS lease sale because of the possible future effects of oil exploration and production. When the CZMA was originally drafted in 1972, there was substantial disagreement whether federal property physically located in the coastal zone—such as parks and military installations—should be subject to state coastal zone management programs.[12] The Conference Committee created a compromise provision: it excluded federal lands from inclusion in the actual coastal zone but provided that consistency would be required for activities conducted on federal lands that "directly affect" the coastal zone. See H.R. Rep. No. 92-1544, 92d Cong., 2d Sess. 12 (1972). The term "directly affecting" the coastal zone, therefore, was created to serve a limiting function: to identify those federal activities that would be subject to the consistency requirements of Section 307(c)(1) while at the same time excluding other activities from the operation of the Act.[13] The lower court's contrary

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define "direct effects" as those "which are caused by the action and occur at the same place and time," while "indirect effects" are those "reasonably foreseeable" effects that are "caused by the action" but "are later in time or farther removed in distance." 40 C.F.R. 1508.8. See page 21, *infra*.

[12] The bill passed by the Senate defined the "coastal zone" as excluding federal property. See S. Rep. No. 92-753, 92d Cong., 2d Sess. 8-9, 45 (1972). The House bill, however, included federal property within the definition of "coastal zone." See H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 2 (1972). Both bills imposed consistency requirements only on federal activities "in" the coastal zone (H.R. Rep. No. 92-1049, *supra*, at 5; S. Rep. No. 92-753, *supra*, at 54). Thus, the House bill would have required consistency for all federal activities on government lands physically located in the coastal zone; the Senate bill would have exempted government activities on federal lands from such a requirement.

[13] The "directly affecting" threshold of Section 307(c)(1) was clearly designed to limit the consistency obligations of the federal government for activities conducted on federal lands within the confines of a state's coastal zone. A fortiori, the standard limits the consistency obligations

conclusion (App. A, *infra*, 14a) that the term was designed by Congress to expand the consistency requirements of the Act is unsupported by the legislative history.[14]

Finally, the court of appeals' expansive interpretation of "directly affecting" cannot be reconciled with a functional analysis of how Congress intended the CZMA to operate. In Section 307(a) and (b) of the Act, 16 U.S.C. 1456(a), (b), Congress directed the Secretary of Commerce to coordinate his administration of the CZMA "with other interested federal agencies" and to refrain from approving a state program until the views of the federal agencies principally affected by a proposed management program "have been adequately considered." Through this process, Congress anticipated that any aspect of a state's coastal zone program that was deemed to be impracticable by federal agencies would be "iron[ed] out" prior to approval. H.R. Rep. No. 92-1049, 94th Cong., 2d Sess. 19 (1972). This federal agency pre-approval review process is vital because, once a state management plan is approved by the Secretary of Commerce, the consistency provisions of Section 307(c)(1) apply to federal actions that directly affect the

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of the government for activities—such as OCS oil and gas leasing—that take place outside the coastal zone.

[14] The only legislative support for the court of appeals' expansive interpretation of Section 307(c)(1) is derived from post-enactment statements contained in House and Senate Committee Reports prepared in connection with the 1980 Amendments to the CZMA. H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980); S. Rep. No. 96-783, 96th Cong., 2d Sess. 10 (1980). Both reports, in nearly identical language, suggest that the Commerce Department adopt an expansive definition of "activities directly affecting the coastal zone." The 1980 Amendments to the CZMA, however, did not address—through enactment or amendment—any of the consistency provisions of the CZMA. These statements, therefore, are entitled to little weight. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *County of Washington* v. *Gunther*, 452 U.S. 161, 176 n.16 (1981); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). Moreover, when the chairman of the House subcommittee was queried about the language of the pending 1980 report on the floor of the House, he replied that it was not intended to "modify the term directly affecting." 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980).

coastal zone. The court of appeals' abandonment of the term "directly" in Section 307(c)(1) undermines this carefully designed congressional scheme.

A federal agency cannot intelligently assess a proposed state management plan unless it knows which of its activities will be implicated by the state program. Section 307(c)(1) provides the agency with an important guidepost: a state management program will affect those activities that have a clear, immediate and identifiable impact on the coastal zone. The lower courts' deletion of the term "directly" from Section 307(c)(1), however, effectively eliminates this guidance. Henceforth, a federal activity will come within a state coastal management plan so long as a possible impact on the coastal zone can be hypothesized.[15] Under the lower courts' approach, such a broad range of federal activities fall within Section 307(c)(1) .hat any "ironing out" of federal/state disagreements on future state management plans may well be impossible. The decision, furthermore, renders past federal agency input into approved management programs largely superfluous: the examining agencies clearly did not assume that a proposed state plan would control any federal activity possessing a foreseeable, albeit tenuous, link to the coastal zone. Unless the Court restores the term "directly" to Section 307(c)(1) of the CZMA, many federal activities not previously considered at the pre-approval stage will suddenly become subject to the consistency requirements of the Act.

2. The decision of the court of appeals disregards not only the plain language of Section 307(c)(1) of the CZMA, but a carefully designed congressional scheme for development of OCS resources as well. The outer continental shelf oil and gas development process is a controversial program with broad significance for the nation's economy, environment, foreign relations and tax revenues. Accordingly, Congress has devoted considerable attention to devising a balanced, yet effective, statutory structure for the program. See, e.g., OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 632. As part of that effort, Congress has

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[15] See note 21, *infra*, pages 20-21.

expressly integrated the consistency requirements of the CZMA into the OCS oil and gas development process. The court of appeals' decision, however ignores this congressional prescription for application of the CZMA and works to undermine the effectiveness of the 1978 Amendments to the OCSLA.

a. In 1978, the Outer Continental Shelf Lands Act was substantially rewritten by Congress to balance environmental protection with promotion of "the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf." *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 n.2 (1981). In that measure, Congress recognized that the OCS oil and gas program is a unique federal undertaking because neither the government, the industry, nor the states can determine, at the outset, what actual oil and gas production activities (such as the placement of platforms and pipelines or the utilization of tankers) will eventually take place on the OCS. Unlike a dam, road, or waterway project, the final contours of the completed activity cannot be predicted until the leasing and exploration processes are well under way. Plainly put, the ultimate effects of issuing an OCS oil and gas lease depend not upon the contours of the lease sale but on the type, quantity and location of commercially valuable hydrocarbon resources discovered through exploration. Accordingly, Congress created a unique federal decisionmaking regime by dividing the OCS process into separate and discrete stages. Under this system of phased decisionmaking, the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed at the later exploration or development and production stages.

The final House Report on the 1978 Amendments explained the purpose behind prescribing this staged method of federal decisionmaking (H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977)):

> Section 25 is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

> The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known. In fact, the failure to have this procedure has led, in part, at least one court to invalidate an entire lease sale.

Thus, Congress dealt with the problem of incomplete information regarding OCS resources and the "onshore and environmental impacts of production activity" by altering the structure of federal decisionmaking. Rather than confronting every possible question regarding production at the lease sale stage, decisions would be made at later, specifically identified stages, when the maximum amount of information would be available.

Under the amended OCSLA, a lease does not authorize the lessee to explore, develop or produce oil or gas. To engage in these activities, the lessee must seek separate federal approvals, first to explore for oil and gas and later to develop and produce the resource. 43 U.S.C. (Supp. IV) 1340, 1351. As restricted by the OCSLA, a lease is a property interest that only entitles the holder to conduct certain preliminary surveys prior to submitting an exploration plan for approval (43 U.S.C. (Supp. IV) 1340(c)(1); 30 C.F.R. 250.34-1). The "direct" effects of a lease sale, therefore, are extremely limited, and do not include the effects of potential exploration, development and production activities for which the lessee may eventually obtain approval.[16]

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[16] Other courts have recognized the limited nature of the lease sale decision, and have accordingly molded the obligations of other generally applicable procedural and substantive federal laws to the OCS process. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (NEPA); *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (Endangered Species Act); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979) (NEPA). As the District of Columbia Circuit noted, "[m]an-

b. The task of integrating the CZMA's consistency requirements into this unique decisionmaking process is not difficult, inasmuch as Congress has addressed the matter explicitly. In 1974, parallel to the efforts to amend the OCSLA to respond to the energy crisis, Congress initiated efforts to amend the CZMA to accommodate energy related activities, including expedited OCS oil and gas leasing. At the outset of this amendatory process, there was disagreement over whether the term "license or permit" in Section 307(c)(3) of the CZMA, 16 U.S.C. 1456(c)(3), covered leases under the OCSLA. S. Rep. No. 94-277, 94th Cong., 1st Sess. 19 (1975).

To clarify this matter, bills reported out of committees in both the House and the Senate proposed inserting the term "lease" into Section 307(c)(3), 16 U.S.C. 1456(c)(3). Addition of the term "lease" to Section 307(c)(3) would mean:

> [I]n practical terms, * * * that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies.

S. Rep. No. 94-277, 94th Cong., 1st Sess. 19-20 (1975). The Executive Branch, however, opposed this proposed amendment on the same ground that eventually persuaded Congress to amend the OCSLA: lack of information at the lease sale stage. An official of the Department of the Interior testified (*Coastal Zone Management: Hearings on H.R. 1776, H.R. 2928, H.R. 3124, et al., Before the Subcomm. on Oceanography of House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 204 (1975) (statement of Royston C. Hughes, Assistant Secretary of the Interior)):

> Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and he has

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datory stage-by-stage review prevents the telescoping of any and every projected hazard to * * * the environment into one overwhelming statutory obstacle. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 609.

> no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease. It is like a chicken-and-egg situation, from our point of view.

Throughout this debate, the focus of attention rested solely on whether the consistency procedures of Section 307(c)(3) should apply at the leasing stage. No one suggested that the proposed amendment would be redundant because Section 307(c)(1) already required such a consistency determination.

Although the amendment as proposed passed the Senate, it was deleted by the House. 122 Cong. Rec. 6128 (1976). The expressed purpose for this floor action was to permit the conference committee to study the impact of the amendment. *Ibid.* At conference, the committee did not restore the deleted amendment; instead it created a new subsection of Section 307(c)(3) that required lessees seeking federal approval of exploration, development and production plans to first comply with CZMA consistency certification requirements. Section 307(c)(3)(B), 16 U.S.C. (Supp. V) 1456(c)(3)(B). The Conference Report explained (S. Conf. Rep. No. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30 (1976)):

> The conference substitute * * * specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.

The conference substitute was enacted by Congress and this special consistency provision for oil and gas leases on the OCS, 16 U.S.C. 1456(c)(3)(B), was subsequently integrated into the 1978 Amendments to the OSCLA. 43 U.S.C. (Supp. IV) 1340(c)(2), 1351(d).

The 1976 Amendments to the CZMA and the 1978 Amendments to the OCSLA thus represent a congressional repudiation of the court of appeals' conclusion that all the potential effects of OCS lease sales are subject to CZMA consistency review at the lease sale stage. Like most who

first encounter the issue, the congressional committees in 1976 initially thought that consistency review at the OCS leasing stage was desirable. But, when acquainted with the practical consequences of such a requirement and the impossibility of satisfying it in a meaningful manner, Congress ultimately rejected that approach. Instead, it substituted special consistency requirements specifically designed to mesh with the structure of the OCS decision-making process. 16 U.S.C. (Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. IV) 1340(c)(2), 1351(d). By expansively defining "directly affecting the coastal zone" and requiring a consistency determination at the leasing stage for potential OCS exploration, development and production activities, the court of appeals has adopted an approach that Congress expressly considered and rejected. The lower court's construction of Section 307(c)(1) is clearly a "creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 141 (1981).

3. The decision of the court of appeals will severely hamper congressionally mandated development of the nation's oil and gas reserves on the outer continental shelf. Congress carefully amended the OCSLA in 1978 to provide for "expedited exploration and development of the Outer Continental Shelf * * *." 43 U.S.C. (Supp. IV) 1802(1). See *Watt* v. *Energy Action Educational Foundation*, *supra*, 454 U.S. at 154 n.2. One of the prime goals of the 1978 Amendments to the OCSLA was to avoid "extensive litigation prior to lease sales." H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 164 (1977). By reducing the scope and consequences of the decision to issue an OCS lease, Congress sought to avoid the major cause of delay in the OCS process: injunctive litigation over lease sales. *Ibid.*[17] The deci-

[17] In recent years, suits to enjoin OCS lease sales have been filed by the States of Alaska, California, Maine, Massachusetts, New Jersey, New York, and North Carolina. California alone has initiated litigation against five of the last six OCS sales off its coast. Even after enactment of the 1978 Amendments to the OCSLA, Congress noted that litigation was a major obstacle to expeditious oil and gas development on the OCS (H.R. Rep. No. 95-1835, 95th Cong., 2d Sess. 20 (1979)):

> Most agree that the main reason for delays in OCS development have been the lawsuits which even when successful [for the federal government] have led to extensive stays of activities.

sion below, however, undermines this congressional objective and actually invites litigation at the lease sale stage.

The court of appeals' broad reading of Section 307(c)(1) will prompt an increase in OCS litigation for at least two reasons. First, by imposing a consistency requirement on potential exploration, development and production activities at the lease sale stage, the opinion forces substantive decisions to be made prematurely, when adequate information is not available to support a reasoned choice. Such federal decisions can be expected to be prime targets for the opponents of OCS lease sales.[18] Second, the Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague. The court stated that "Interior * * * must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in the light of the then available knowledge" (App. A, *infra*, 22a). But the court confessed that it was unable to "delineate[ ]" when the appropriate degree of consistency would be achieved for a particular lease sale (*ibid.*). While it prescribed a "path" to eventual consistency, it refused to provide a "verbal formula[ ]" to test the adequacy of the government's efforts at the lease sale stage (*ibid.*). Instead, the court suggested that each OCS lease sale would have to be examined on a case-by-case basis (*ibid.*). This case-by-case approach will stall the OCS oil and gas leasing process for years

[18] Since the decision below, two other courts have issued injunctions against OCS lease sales pending the preparation of consistency determinations. *California* v. *Watt*, No. 82-2284 (CHH) (GH) (C.D. Cal. June 9, 1982); *Governor Thomas Kean* v. *Watt*, No. 82-2420 (D. N.J. Oct. 8, 1982).

Many of the upcoming OCS lease sales are adjacent to states within the Ninth Circuit. Therefore, the Department of the Interior will prepare consistency determinations for all sales scheduled to be held prior to this Court's disposition of this case. States that have already received such consistency determinations have disputed the conclu ons and the adequacy of the analysis contained in the statements. Letter from James Souby (State of Alaska) dated December 30, 1982, regarding Sale 57 (Norton Sound); Letter from James Hoyte (Commonwealth of Massachusetts) dated January 17, 1983, regarding Sale 52 (Georges Bank).

while the states and the federal government litigate the procedural adequacy and substantive content of discrete lease sale consistency determinations.[19]

4. In addition to hampering the OCS oil and gas leasing process, the court of appeals' expansive definition of "directly affecting the coastal zone" may severely disrupt a wide range of federal activities. As explained above (page [illegible], *supra*), Congress assumed that federal objections to state coastal zone management programs would be resolved prior to program approval by the Secretary of Commerce. Twenty-eight programs of state or territorial governments have now been approved, and federal agencies, including the Department of Defense, are obligated to conduct any activities "directly affecting the coastal zone" in a manner that is consistent "to the maximum extent practicable" with those programs.[20] 16 U.S.C. 1456(c)(1). The court of appeals' conclusion that a mere indirect influence on the coastal zone satisfies the "directly affecting" threshold test subjects a wide range of federal actions and programs to the substantive limitations of Section 307(c)(1).[21] The court's

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[19] The Ninth Circuit apparently sought to alleviate the inevitable litigation delays engendered by its decision by providing a role for the Secretary of Commerce in the Section 307(c)(1) consistency process. The court concluded that the Secretary of Commerce was authorized to mediate a resolution of opposing viewpoints (App. A, *infra*, 23a). Despite the absence of a national interest override provision in Section 307(c)(1), the court suggested that the Secretary could "reconcile the paramountcy of the national interest with the concerns of the state" according to "those procedures explicitly set forth in subsections [307](c)(3) and (h)" (*ibid.*). Existing regulations, however, clearly state that mediation of disputes by the Secretary of Commerce is wholly voluntary and the states are free to seek relief in the courts without resorting to mediation. 15 C.F.R. 930.43; 930.116. Moreover, even if the Secretary of Commerce did possess some binding decisionmaking power, his ruling may well be subject to judicial review as final agency action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

[20] By statute, a coastal state is any state bordering the Atlantic, Pacific, or Arctic Oceans, the Gulf of Mexico, Long Island Sound, or the Great Lakes. 16 U.S.C. (Supp. V) 1453(4).

[21] By holding (App. A, *infra*, 13a) that a direct effect upon the coastal zone exists whenever a federal agency sets in motion a chain of events that may lead to impacts on the coastal zone, the Ninth Circuit

expansive reading of "directly affecting the coastal zone," therefore, extends the reach of the CZMA far beyond what was contemplated when the Act was passed or the state programs were approved.

The court of appeals' wholesale use of the environmental impacts disclosed by Lease Sale No. 53's environmental impact statement (EIS) in identifying direct effects under Section 307(c)(1) of the CZMA is particularly disturbing. Under the National Environmental Policy Act of 1969, a federal agency preparing an EIS must address both the direct and the indirect effects of its proposed action upon the environment.[22] By treating all of the potential coastal zone effects identified in an impact statement as direct effects for CZMA purposes, the lower courts have obliterated the difference between a direct and an indirect effect. In terms of complying with NEPA, the distinction between the two types of effects may not be significant, but for CZMA purposes the difference is vital. The consistency requirement of the CZMA imposes a *substantive* limitation on federal activities. NEPA, in contrast, has a fundamentally proce-

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has adopted a test that requires consistency for federal activities having no identifiable, immediate, or clear relationship with a coastal zone. Virtually any tenuous connection between a decision to authorize a federal activity and a subsequent potential impact on the coastal zone could qualify as a direct effect under the court's definition. If consistency with the oil pipeline provisions of a coastal state's management plan is required before an OCS lease sale can be held, consistency might also be required for a federal coal lease sale in Wyoming. There, the "direct effect" upon the coastal zone would be the possibility that a lessee might use a proposed slurry pipeline to transport coal to a Gulf Coast port. In neither case does the initial federal decision have an immediate impact upon a coastal zone. But, as reasoned by the Ninth Circuit, each activity does set in motion a chain of events that may impact the coastal zone.

[22] The regulations define the term "effects" to include:

> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably forseeable. * * *

40 C.F.R. 1508.1.

dural, informative purpose, and does not prescribe the substantive content of federal decisions. See *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223 (1980). By employing the table of contents of an EIS to determine the "direct effects" upon the coastal zone, and reading the word "directly" out of Section 307(c)(1) of the CZMA, the court has transformed the procedural obligations of NEPA into a substantive limitation on federal action. This result invites chaos for the activities of the federal government as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5699
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., THE CALIFORNIA COASTAL COMMISSION, THE CALIFORNIA AIR RESOURCES BOARD, THE CALIFORNIA RESOURCES AGENCY, THE CALIFORNIA DEPARTMENT OF FISH AND GAME, THE CALIFORNIA DEPARTMENT OF CONSERVATION, PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR; THE UNITED STATES DEPARTMENT OF THE INTERIOR; EDWARD HASTEY, AS ACTING DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT BURFORD, AS DIRECTOR DESIGNATE OF THE UNITED STATES BUREAU OF LAND MANAGEMENT, IN HIS OFFICIAL CAPACITY AS DIRECTOR WHEN AND IF ASSUMED; THE UNITED STATES BUREAU OF LAND MANAGEMENT, DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION; AMOCO PRODUCTION COMPANY, A CORPORATION; ATLANTIC RICHFIELD COMPANY, A CORPORATION; CHAMPLIN REFINING COMPANY, A CORPORATION; CHEVRON U.S.A. INC.; CITIES SERVICE COMPANY, A CORPORATION; CONOCO, INC.; ELF ACQUITAINE OIL AND GAS, A CORPORATION; EXXON CORPORATION; GETTY OIL COMPANY, A CORPORATION; GULF OIL CORPORATION; PHILLIPS PETROLEUM COMPANY, A CORPORATION; AND SHELL OIL COMPANY, A CORPORATION, DEFENDANTS-IN-INTERVENTION/ APPELLANTS.

No. 81-5700
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC.; THE SIERRA CLUB; FRIENDS OF THE EARTH; FRIENDS OF THE SEA OTTER; AND THE ENVIRONMENTAL COALITION ON LEASE SALE 53, PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLANTS.

No. 81-5701
DC# CV 81-2080-MRP

STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS-APPELLEES,

COUNTY OF HUMBOLDT; COUNTY OF MARIN; COUNTY OF MENDOCINO; COUNTY OF MONTEREY; COUNTY OF SAN LUIS OBISPO; COUNTY OF SAN MATEO; COUNTY OF SANTA BARBARA; COUNTY OF SANTA CLARA; COUNTY OF SANTA CRUZ; COUNTY OF SONOMA; CITY AND COUNTY OF SAN FRANCISCO; CITY OF BRISBANE; CITY OF CAPITOLA; CITY OF CARMEL-BY-THE-SEA; CITY OF LOS ANGELES; CITY OF MORRO BAY; CITY OF PISMO BEACH; CITY OF SAN LUIS OBISPO; CITY OF SANTA BARBARA; CITY OF SANTA CRUZ; CITY OF SANTA MONICA; CITY OF SEASIDE; ASSOCIATION OF MONTEREY BAY AREA GOVERNMENTS, PLAINTIFFS-IN-INTERVENTION/APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLANTS.

No. 81-5811
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS,

COUNTY OF SAN DIEGO, PLAINTIFF-IN-INTERVENTION/ APPELLANT,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCITION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5812
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS-APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

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No. 81-5813
DC# CV 81-2080-MRP

STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS,

COUNTY OF SAN DIEGO, PLAINTIFF-IN-INTERVENTION/ APPELLANT,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL,. DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/ APPELLEES.

No. 81-5814
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION/APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5815
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS-APPELLANTS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES,

WESTERN OIL AND GAS ASSOCIATION, A REGIONAL TRADE ASSOCIATION, ETC., ET AL., DEFENDANTS-IN-INTERVENTION/APPELLEES.

No. 81-5720
DC# CV 81-2081-MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ETC., ET AL., PLAINTIFFS-APPELLEES,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN-INTERVENTION/APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR; ETC., ET AL., DEFENDANTS-APPELLANTS,

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No. 81-5822
DC# CV 81-2080-MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ETC., ET AL., PLAINTIFFS,

COUNTY OF HUMBOLDT, ETC., ET AL., PLAINTIFFS-IN INTERVENTION/APPELLANTS,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ETC., ET AL., DEFENDANTS-APPELLEES.

Filed Aug. 12, 1982

OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and Submitted January 15, 1982

Before: SNEED, TANG, and PREGERSON, *Circuit Judges*

SNEED, *Circuit Judge:*

This appeal concerns a dispute over the proposed sale by the United States Department of Interior of leases to drill for and extract oil and gas in the outer continental shelf (OCS) off the coast of California.

Plaintiffs below were the State of California and various agencies within the state. Intervening as plaintiffs were various cities and counties in California (hereafter "local governments"). Plaintiffs in a companion case, which was consolidated with this one, were the Natural Resources Defense Council, the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereafter "environmental groups"). Defendants in both cases below were James G. Watt, acting in

his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management (BLM). Intervening as defendants in both actions were Western Oil and Gas Association (WOGA), a regional trade association of companies and individuals in the petroleum industry, and various oil companies that had submitted high bids on one or more tracts offered in Lease Sale No. 53.

Plaintiffs claimed below that defendants violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. Finding that there were no genuine issues of material fact in the two consolidated cases, the district court granted summary judgment to the plaintiffs on their claim based on the Coastal Zone Management Act (CZMA), granted summary judgment to defendants on the remaining issues, and dismissed the claims of the environmental groups for lack of standing. The court enjoined leasing of the disputed tracts and ordered the bids and deposits returned but stayed the effect of the latter order pending appeal.[1] All parties ap-

[1] The district court order reads as follows:

"ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants'

pealed. We affirm in part, reverse in part, vacate in part, and stay in part.

I.

ISSUES ON APPEAL

There are four issues on appeal which we state as follows:

1. CZMA Issue: Did the Secretary of Interior violate Section 307(c)(1) of the CZMA by selling oil and gas leases for the outer continental shelf without a determination of

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Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order."

California v. Watt, 520 F. Supp. 1359, 1389 (C.D. Cal. 1981).

consistency with California's coastal zone management plan? Our answer is that he did.

2. NEPA Issue: Did the Department of Interior violate the National Environmental Policy Act (NEPA) by failing to supplement the Environmental Impact Statement? Our answer is that it did not.

3. OCSLA Issue: Did the Secretary violate section 19 of the Outer Continental Shelf Lands Act (OCSLA) by refusing to accept the recommendations of the governor of the State of California regarding Lease Sale 53? Our answer is that he did not.

4. Standing Issue: Do the environmental groups have standing to enforce the consistency determination provision of the CZMA? Our answer is that they do.

II.

STANDARD OF REVIEW

As already noted, summary judgment was granted by the district court on all issues. Our review is identical to that of the district court. *Washington ex rel. Edwards v. Heinmann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980). That is, we may affirm a summary judgment only if, viewing the evidence in the light most favorable to the party against whom it is granted, we find no genuine issue of material fact, and we find that the prevailing party is clearly entitled to judgment as a matter of law. *Id.* at 888; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981).

III.

FACTS AND BACKGROUND

While the facts and background of these cases are complex, they are thoroughly laid out in the district court opinion. *California v. Watt*, 520 F. Supp. 1359, 1365-68 (C.D. Cal. 1981). To aid the reader of this opinion, however, we shall summarize briefly the pertinent facts and background of these cases.

The lease sale in dispute is Lease Sale 53, consisting of a maximum offering of 243 designated tracts of the OCS for

mineral development. The tracts in Lease Sale 53 lie in five different basins off the coast of California, including the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south. During the course of decision-making on Lease Sale 53, the Department of Interior at various times proposed leasing within the Santa Maria Basin only and at other times within all five of the basins originally included.

In November 1977, BLM issued a Call for Nominations for Lease Sale 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state, and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts that they believed should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors. In October 1978 the Department of Interior announced the tentative tract selection for Lease Sale 53. The Santa Maria Basin contained 115 of the 243 tracts involved in the sale.

A draft Environmental Impact Statement (EIS) was released for public comment in April 1980. The draft EIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale 53, was based on a reserve estimate of 404 million barrels of oil for the Santa Maria Basin.

In September, 1980, a final EIS was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey made available revised reserve estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate was incorporated in an addendum to the EIS. A Secretary Issue Document (SID), an internal document intended to aid the Secretary in making decisions concerning lease sales, was released in October 1980. The SID concerned the potential impact of Lease Sale 53 on the environment, and concluded that a supplemental EIS was not needed.

On July 6, 1980, the California Coastal Commission requested that the Secretary submit a consistency determina-

tion at the time of the issuance of the proposed notice of sale. On October 16, 1980, the former Secretary of the Interior, Cecil D. Andrus, issued the proposed notice of sale for Lease Sale 53. The notice proposed leasing only within the Santa Maria Basin, the four other basins being deleted from the proposed sale. By letter of October 22, 1980, the Department of Interior notified the California Coastal Commission (CCC) of its "negative determination," to the effect that the preleasing activities associated with Lease Sale 53 would have no "direct effects" on California's coastal zone, and that as a consequence no consistency determination was necessary. In response to this negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 29 tracts in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale 53 to be consistent with the California Coastal Management Plan. On December 24,1980, Governor Edmund G. Brown, Jr. of California, responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 32 tracts located in the northern portion of the Santa Maria Basin.

The new Secretary of Interior, James G. Watt, issued a revised proposed notice of sale for Lease Sale 53 on February 10, 1981. The four basins previously deleted from the proposed sale by former Secretary Andrus were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposal to Governor Brown, Secretary Watt requested recommendations pursuant to section 19 of the OCSLA, 43 U.S.C. § 1345. By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale 53. He reiterated his position that, based upon the balancing test of section 19, the northern 32 tracts in the Santa Maria Basin should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale 53 into two sales, with the

sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin, and provided a brief explanation of the basis for the rejection.

On April 29, 1981, California sought an injunction in district court against the lease sale. The court, although it allowed bids on the tracts to be received and opened, on May 27, 1981, granted a preliminary injunction which prevents the Department of Interior from accepting or rejecting the bids or issuing leases on the disputed tracts. California and the local governments moved for summary judgment on their claim that Lease Sale 53 violated numerous statutes. Secretary Watt and the other federal defendants cross-claimed for summary judgment on the same issues. The response of the district court to these motions has already been indicated.

We find that no genuine issue of material fact exists. The questions before us, therefore, are whether the parties prevailing below are clearly entitled to their judgments as a matter of law. We now turn to the four legal issues with which this appeal is concerned.

IV.

COASTAL ZONE MANAGEMENT ACT

This issue concerns the application of CZMA Section 307(c)(1), 16 U.S.C. § 1456(c)(1), to the lease sale stage of outer continental shelf (OCS) oil, gas, and mineral development. Section 307(c)(1) reads:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

While it is conceded on appeal that this section does apply at the lease sale stage, the parties vigorously dispute whether Lease Sale 53 would have "direct effects" on California's coastal zone.

We hold that Lease Sale 53 would "directly affect" the state's coastal zone. The district court so held and we agree. The federal appellants and oil companies (hereafter collectively referred to as "federal appellants") propose a definition of "directly affecting" that limits the scope of direct effects from a lease sale to those effects that "are part of, or immediately authorized by, a lease sale." *See* Brief For The Federal Appellants at 21-22; Brief of Appellants Western Oil & Gas Association at 27. Subsequent steps such as the promulgation of exploration or development plans are not direct effects of the lease sale, their argument runs, because separate consistency determinations are required at each of these later stages. It follows that a lease sale has no direct effects upon the coastal zone; such direct effects as there may be affect things other than the coastal zone. This definition and reasoning underlies the Secretary of Interior's determination that no consistency determination is required.

California, the local governments, and the amici curiae environmental groups (hereafter collectively referred to as "California") propose a broader definition of "directly affecting," encompassing effects of the lease sale that the lessor "reasonably anticipates." Another formulation of this definition is that any activity having a functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone directly affects the coastal zone. The district court adopted this broad definition, holding that the federal appellants "cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized." *California v. Watt, supra*, 520 F. Supp. at 1379-80.

We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease Sale 53 on California's coastal zone are detailed by the district court. *Id.* at 1371, 1380-82. We need not repeat them here. It is

enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction. *Id.*

Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

A. *Purpose of the CZMA*

This diminution would not be consistent with the purposes of the CZMA, which was enacted to promote the preservation of natural resources in the coastal zone. 16 U.S.C. § 1452(1). Under the Act, each coastal state has primary authority over the lands and waters within its three-mile coastal zone, to be exercised "in cooperation with Federal and local governments and other vitally affected interests." 16 U.S.C. § 1451(i).

A key element in the CZMA's comprehensive plan is the voluntary adoption by each coastal state of a federally-approved coastal zone management plan, which must adequately consider the "national interest" and "the views of Federal agencies principally affected by such program." 16 U.S.C. §§ 1455(c)(8), 1456(b). The Act requires the state's plan to include "a planning process for energy facilities like-

ly to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities." 16 U.S.C. § 1454(b)(8) (emphasis added). A quid pro quo for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan. 16 U.S.C. § 1456(c).

Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement.

B. *Legislative History*

Our approach is not inconsistent with the legislative history of the CZMA. Although, as the district court pointed out, the legislative history of this Act is "inconclusive," 520 F. Supp. at 1371, it does lend support, when considered as a whole, to our approach.

In 1972, the Conference Committee substituted the phrase "directly affecting the coastal zone" for "in the coastal zone," in an apparent attempt to expand the scope of the provision. *See id.* No clue is given in 1972 as to how "directly" was to be interpreted. In 1976, in conjunction with amendments to CZMA sections other than 307(c)(1), the Senate Report noted:

> There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.
>
> ... Full implementation of the Coastal Zone Management Act of 1972 ... could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S. Rep. No. 277, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1770.

In the Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (1980), Congress did not amend the section 307(c)(1) consistency provisions, but the reports of both the Senate and House Committees support a broad interpretation of "directly affecting." *See* 520 F. Supp. at 1372-73. The Senate report stated that:

> intergovernmental coordination for purposes of OCS development commences *at the earliest practicable time* in the opinion of the Committee, as the Department of the Interior *sets in motion a series of events which have consequences* in the coastal zone.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added). The House Committee specifically addressed the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H. R. Rep. No. 1012, 96th Cong., 2d Sess. 34-35, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4382-83. The Committee offered two alternative definitions of the phrase "directly affecting:" (1) The threshold test applies "whenever a Federal activity [has] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies." *Id.* at 34, U.S. Code Cong. & Ad. News at 4382. (2) The Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence." *Id.* The House indicated its support of an "expansive interpretation of the threshold test," *id.* at 35, U.S. Code Cong. & Ad. News at 4383, and reiterated the Senate's statement that consultation between federal and state agencies should occur "at the earliest practicable time." *Id.* at 34, U.S. Code Cong. & Ad. News at 4382; *see also* S. Rep. No. 783, *supra*.

We recognize that these post-enactment committee statements might not represent a view adopted by Congress after full deliberation and, in any event, are not conclusive. However, these statements must be given appropriate weight. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Walt Disney Productions v. United States*, 480 F.2d

66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974). In the circumstances of this case we accord them substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants.

C. *National Oceanic and Atmospheric Administration's Interpretation.*

Our approach does no violence to our obligation to pay deference to the appropriate agency's interpretation of section 307(c)(1). The National Oceanic and Atmospheric Administration (NOAA) is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 908 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Its current view of the definition of "directly affecting" is unclear.

Until May 1981, NOAA consistently took the position that pre-leasing activities were subject to consistency review, and favored a broad interpretation of "directly affecting." *See Watt v. California*, *supra*, 520 F. Supp. at 1376-77. In 1978, NOAA stated that section 307(c)(1) was intended to apply to "all Federal actions which were *capable of significantly affecting* the coastal zone." 43 Fed. Reg. 10,510-11 (1978) (emphasis added). Although NOAA deleted this definition in 1979 in response to a Department of Justice opinion taking issue with that portion of the definition, 44 Fed. Reg. 37,142 (1979), it reiterated the view that "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 44 Fed. Reg. 37,146-47 (1979). Along the same lines in 1980, NOAA noted:

> In our view Federal consistency requirements subject final notices of OCS sales to consistency determinations. This critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will *invariably* affect coastal resources.

Letter from NOAA to State Coastal Management Program Directors (April 9, 1980) (emphasis added).

In May 1981, shortly after complaints were filed in the present case, NOAA filed a notice of proposed rulemaking defining "directly affecting" in a way more nearly consistent with, if not identical to, that urged on us by the appellants. 46 Fed. Reg. 26,658-59 (1981). According to the definition, a federal activity directly affects the coastal zone only:

> if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, *without further required agency approval.*

Id. (emphasis added). In the comments to this notice, NOAA listed lease issuance as an example of an activity that would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26,660. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August, however, resolutions were introduced in both houses of Congress disapproving the new regulations. *Cf.* 16 U.S.C. § 1463a. After the district court decision in this case, and following a vote by the House Merchant Marine and Fisheries Committee to disapprove the regulations on October 16, 1981, NOAA suspended the effective date of the regulations and moved to withdraw them, explictly acknowledging the negative reaction it had received from both Congress and the coastal states. 46 Fed. Reg. 50,937, 50,976 (1981).

An agency's interpretation of a statute, while not having the force of law, is entitled to deference if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States v. Vogel Fertilizer Co.*, ___ U.S. ___, 102 S.Ct. 821, 827 (1982), *quoting United States v. Correll*, 389 U.S. 299, 307 (1967); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, Nos. 80-7673, 81-7021, slip. op. at 1243-44 (9th Cir. March 22, 1982). This general principle of deference, while fundamental, only sets the framework for judicial analysis, *United States v. Vogel Fertilizer Co., supra*, 102 S.Ct. at 827,

quoting United States v. Cartwright, 411 U.S. 546, 550 (1973), and poses no obstacle in this case to our rejection of appellants' approach.

As indicated, NOAA's short-lived narrow definition of "directly affecting" was first proposed during the pendency of this litigation, was specifically disapproved by some members and at least one Committee of Congress, was contrary to NOAA's longstanding position on the matter, and may not reflect NOAA's present view. To defer to such a passing phase in the appropriate agency's interpretation would amount to obeisance to shadows and a flight from judicial responsibility. On the other hand, we acknowledge that NOAA's earlier view that "directly affecting" should be liberally construed provides support to our holding that Lease Sale 53 must be accompanied by a section 307(c)(1) consistency determination.

D. *Consistency with Outer Continental Shelf Lands Act*

The federal appellants also claim that a definition of "directly affecting," other than one substantially similar to NOAA's aborted narrow view, is inconsistent with section 19 of the OCSLA. This section provides for Department of Interior consideration of state governors' recommendations regarding "size, timing, or location" of lease sales. We acknowledge, as we must, that federal statutes should be construed in a consistent and harmonious manner. Only in this way can congressional intent can be given its fullest expression. *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978).

We find no conflict between our holding with respect to the scope of "directly affecting" as applicable to the facts of this case and the functions and purposes of the OCSLA. The CZMA and the OSCLA focus on different concerns—the OCSLA on development of oil and gas resources, and the CZMA on environmental concerns. *American Petroleum Institute v. Knecht*, *supra*, 456 F. Supp. at 919. They impose on the federal government separate obligations owing to different parties, and are capable of co-existence. Their consistency is further supported by the "savings clause" in the OCSLA, which expressly provides: "[N]oth-

ing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972." 43 U.S.C. § 1866. We, therefore, conclude that Lease Sale 53 cannot proceed until the Secretary of Interior makes a determination that the proposed lease is consistent, to the maximum extent practicable, with the California coastal zone management plan.

E. *Placement of Final Authority to Determine That the OCS Lease Sale 53 is Consistent to the Maximum Extent Practicable*

To hold that the Secretary of Interior is required by CZMA § 307(c)(1) to make a consistency determination before going ahead with Lease Sale 53 unavoidably raises additional issues. Foremost among these is whether consistency to the maximum extent practicable of the federal activity with the approved state management program means simply conformity to the program in the manner deemed appropriate by the state concerned. The federal appellants insist that the district court, in effect, so held by enjoining the lease sale "until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." 520 F. Supp. at 1389.

Assuming *arguendo* that the district court did so hold, we here reject that interpretation of the CZMA. The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*. It only provides that the activity be consistent *to the maximum extent practicable*. The Act is not explicit with respect to the location of final authority to determine whether the required consistency exists. We believe such authority must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of

Congress, weighs too lightly the interests of the nation against that of a state.

Our conclusion is supported by the language and structure of both the CZMA and the OCSLA, as well as the history of events leading to the enactment of the OCSLA.

1. CZMA.

With respect to any plan for the exploration, development, and production stages, section 307(c)(3) of the CZMA sets out an elaborate procedure for dealing with disagreements between a coastal state and an applicant for a federal license or permit to conduct an activity affecting the coastal zone concerning the consistency of the federal activities and the state's management program. Under this section, to obtain a federal license or permit the state must certify that the activity is consistent unless the Secretary of Commerce properly finds that the activity "*is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.* 16 U.S.C. § 1456(c)(3)(A)–(B) (emphasis added). This provision clearly precludes an irreversible state veto of OCS activity at the exploration, development, and production stages. The Secretary of Commerce is given the final say as to whether the activity is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages. We do not think it intended to so provide.

2. OCS History and the OCSLA.

The history of the dispute concerning offshore resources supports our conclusion that a conclusive state veto was never intended over OCS oil and gas development. In 1953, to settle the long-standing dispute between the federal government and coastal states concerning control over offshore areas, Congress enacted the Submerged Lands Act, 43

U.S.C. §§ 1301-43. This "1953 Compromise" of the so-called Tidelands Oil Issue granted coastal states "title to and ownership of" submerged lands within three miles of the coast, the area refered to as the "coastal zone." 43 U.S.C. §§ 1301(a), 1311(a). The federal government was given exclusive proprietary control over "the soil and seabed of the Continental Shelf" outside this three-mile zone. 43 U.S.C. §§ 1302, 1332(a). The CZMA was not intended to change this division of control. Section 307(e) of the CZMA provides that:

> Nothing in this title shall be construed—
> (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.

16 U.S.C. § 1456(e). *See also*, H. R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 12 (1972).

Granting final veto power to coastal states would thwart the purposes of the OCSLA. As the Supreme Court has recently stated, "Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources." *Gulf Offshore Co. v. Mobil Oil Corp.*,— U.S. ____, 101 S. Ct. 2870, 2877 (1981). In 1978, in response to concern over increased dependence on foreign oil, the OCSLA was amended to:

> establish policies and procedures for managing the oil and natural gas resources of the [OCS] which are intended to result in expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.

43 U.S.C. § 1802(1). These are vitally important goals for the well-being of the country, and the ultimate management authority over their achievement is vested in the federal government and not a particular coastal state.

Section 19 of the OSCLA, 43 U.S.C. § 1345, it is true, instructs the Secretary of Interior to consider recommendations by the Governor of an affected state regarding the size, timing, or location of a proposed lease sale. 43 U.S.C.

§1345(a). The section gives great weight to the Governor's recommendations, providing that the Secretary of Interior "shall accept" them if they provide a reasonable balance between the national interest and the well-being of the citizens of the state. Nevertheless, it is explicitly provided that the Secretary's decision to reject such recommendation is final, unless his decision is arbitrary or capricious. 43 U.S.C. § 1345(c)(d). The finality of the Secretary of Interior's decision under this section is another strong indication that the federal government is intended to have the ultimate authority over the OCS leasing program.

We, therefore, interpret section 307(c)(1) to require that Lease Sale 53 be made consistent with California's plan to the maximum extent practicable. Accommodation to California's plan to a lesser extent does not afford consistency *to the maximum extent practicable*. Accommodation to a greater extent exceeds the command of the statute. In making this consistency determination, the Secretary of Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be available. *See* 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude *any* possible future inconsistency from arising as development proceeds. The Secretary of Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge.

The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling, and production would be hampered or prescribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. Beyond this it is difficult to go; verbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

3. Settlement of Disputes as to Consistency by Secretary of Commerce.

Inasmuch as the Secretary of Interior has not yet made the consistency determination that we hold he must with respect to Lease Sale 53, it is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation. Should the state disagree with the Secretary's consistency determination, sections 307(c) and (h) contain mediation procedures that may be invoked by the Secretary of Commerce to reconcile the paramountcy of the national interest with the concerns of the state. We do not regard subsection (c)(1) of section 307 as lacking, or existing independently of, those procedures explicitly set forth in subsections (c)(3) and (h).

F. *Remedy*

As already indicated, the district court's order required the federal appellants to conduct "all activities on [the tracts at issue] in a manner consistent with California's Coastal Management Plan." 520 F. Supp. at 1389. The premise on which this order rests appears to be that California's view of consistency ultimately will be controlling. We do not agree with this premise. We therefore, affirm only that portion of paragraph 5 of the district court's order that requires a consistency determination to be made before lease Sale 53 goes forward. That is, paragraph 5 is affirmed insofar as it reads:

> Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue. . . .

We modify that paragraph to delete the remainder, which provides as follows: "and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." If the State does not agree with a determination of consistency by the Secretary of Interior, the dispute-resolution procedures of the CZMA are available.[2]

The district court also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. *Id.* The federal appellants and oil companies argue that the cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids.[3] They argue that such drastic measures should be deferred at least until it is finally decided whether Lease Sale 53 can go forward in its present form. We agree. The resolution of the dispute must await a consistency determination by the Secretary of Interior. If the state does not agree with this determination, final resolution of the conflict must await the outcome of the CZMA dispute resolution procedures. During the pendency of these procedures, the status quo should be maintained. Therefore, we stay the portion of the district court's order (*i.e.*, paragraphs 3 and 4) requiring the cancellation of the bids and return of the deposits and that portion of paragraph 5 of the order which required that federal lease sale activities be conducted consistently with California's coastal zone management plan.

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[2] Appellants also object to the district court's failure to perform a "particularized analysis" of possible remedies and the consequences, as required by Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds*, 439 U.S. 922 (1978). Although this claim appears to have merit, we do not reach the issue of the applicability of Alaska v. Andrus, in view of our disposition on other grounds of the remedy ordered below.

[3] WOGA concedes that it suggested to the lower court the very remedy to which it now objects, but this does not affect our decision on this issue.

To the extent that the deleted portion of paragraph 5 also requires that all other activities, including exploration, development, or production, be conducted consistently with California's plan, it embraces activities and stages of offshore oil development not at issue in this case. Only the lease sale is at issue. We therefore vacate the district court's order insofar as it extends beyond the lease sale stage.

Finally, we retain jurisdiction over this appeal, and if the consistency determination process is not completed within a reasonable time we will entertain a motion to vacate our stay.

On the CZMA issue, therefore, we hold as follows:

(1) We affirm the district court's order insofar as it requires a consistency determination for Lease Sale 53.

(2) We stay the district court's order insofar as it declares bids and leases null and void and requires return of monies posted and insofar as it requires federal lease sale activities to be conducted consistently with California's coastal zone management plan.

(3) We vacate the district court's order insofar as it applies beyond the lease sale stage.

V.

NATIONAL ENVIRONMENTAL POLICY ACT

California also sought to enjoin the lease sale on the basis of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, *et seq.* It contends that the federal government's failure to supplement the Environmental Impact Statement (EIS) to incorporate the latest estimates of oil and gas reserves in the basin was a violation of section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(c). That section requires that an EIS be prepared and circulated for major federal actions affecting the quality of the human environment.

The Bureau of Land Management (BLM) released the final EIS on Lease Sale No. 53 in early September, 1980, incorporating the original estimates of oil and gas reserves provided by the United States Geological Survey (USGS). A few days before the release of the EIS, on August 28,

1980, the USGS released revised estimates of the oil and gas reserves. These new figures indicated that the reserves were thought to be roughly twice those originally estimated. Although the BLM did not alter the body of the EIS to reflect the new figures, it did attach the new estimates to the EIS as an Addendum. Also, a Secretary Issue Document (SID) was prepared for the Secretary of Interior in October, 1980, containing revised estimates of the environmental impacts using the new data. It was concluded in the SID, which is a public document, that a supplement to the EIS was not needed.

The district court granted summary judgment to the federal government on this issue, holding that:

> the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable.

520 F. Supp. at 1383. We affirm.

The district court in its analysis focused on the adequacy of the initial EIS. 520 F. Supp. at 1382, *quoting Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981). While we agree that the initial EIS was adequate, new information may require its supplementation. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980). A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS. *Id.* at 1023-24. Guidelines of the Council on Environmental Quality require that agencies:

> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> * * *
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c).

An agency's decision not to supplement an EIS will be upheld if it was reasonable. *Warm Springs Dam*, *supra*, at 1024. Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency con-

sidered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.* We hold that the decision of the BLM not to supplement the EIS for Lease Sale 53 was not unreasonable.

Whether the revisions to the estimates of oil reserves will change the environmental impact of Lease Sale 53 significantly is problematic. The accuracy of the data is open to question, given the inherently speculative nature of oil reserve estimates. Also, the qualitative impacts on the environment possibly could be the same under either set of estimates. In fact, in the SID only a small quantitative increase in impact was estimated. We acknowledge being influenced by the fact that additional Environmental Impact Statements will be required at the later exploration, production, and development stages, and these will, of course, be based on the latest reserve estimates available at the time they are prepared.

The revised estimates of oil and gas reserves were made available to the public as an addendum to the EIS, and environmental impact estimates using the new data were made public in the SID. While a SID cannot substitute for a supplemental EIS was unnecessary. The SID also provides a detailed explanation for the Secretary of Interior's decision not to supplement. While the Addendum and SID did not go through the public comment process, that process is not essential every time new information comes to light after an EIS is prepared. Were we hold ohterwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information, *Warm Springs Dam*, *supra*, at 1023, could prolong NEPA review beyond reasonable limits.

The district court did not err in its conclusion with respect to the NEPA issue.

VI.

OUTER CONTINENTAL SHELF LANDS ACT

Section 19 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1345, provides, as already noted,

that the governor of an affected state may submit recommendations to the Secretary of Interior regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. 1345(c). The statute provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious." 43 U.S.C. § 1345(d). *See, e.g., Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1 (D.C. Cir. 1976).

California claims that Governor Brown's recommendations provided for a reasonable balance between national and state interests, and thus that the Secretary's failure to accept the Governor's recommendations was arbitrary and capricious. California also contends that the Secretary violated certain procedural requirements of Section 19.

As the district court properly noted, the scope of our review is limited. In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *quoted in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 302 (9th Cir. 1980). Additionally, we must consider whether the Secretary "articulate[d] a rational connection between the facts found and the choice made." *Bowman Transportation, Inc., supra*, at 285, and whether the Secretary made the decision in accordance with his duty under law. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 904-05, *aff'd*, 609 F.2d 1306 (9th Cir. 1979). The court may not substitute its judgment for that of the agency.

The district court, while not impressed with the spirit with which the Secretary dealt with the Section 19 requirements, held that, giving due deference to his judgment, the Secretary's decision to reject Governor Brown's recommen-

dations was not legally "arbitrary and capricious." 520 F. Supp. 1385-86. We agree.

The Secretary did analyze factors weighing in the balance of interests, and described this analysis in a letter mailed to Governor Brown on May 1, 1981. As the district court noted, the OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. It provides that the Secretary must determine whether the governor's recommendation draws a "reasonable balance" between two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute requires that the determination of the "national interest" encompass "the desirability of obtaining oil and gas supplies in a balanced manner," but does not attempt to define the factors relevant to the citizens' well-being. *Id.*

The Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills, and such "not quantifiable" factors as damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses." 520 F. Supp. 1384. We agree with the district court that the Secretary gave some consideration to the relevant factors and his decision cannot be said to be arbitrary or capricious.

California also claims that the Secretary failed to comply with the procedural requirements of section 19 by not providing sufficient opportunity for the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c).

The statute requires that the Secretary in making the decision to accept or reject the recommendation provide the Governor "the *opportunity* for consultation." 43 U.S.C. § 1345(c) (emphasis added). We agree with the district court that the Secretary's consultation with Governor Brown was adequate to meet the technical requirements of the statute. 520 F. Supp. 1385. The statute also requires the Secretary to "communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations." 43 U.S.C. § 1345(c). We also agree with the court below that the Secretary's explan-

atory letter to the Governor satisfied this requirement, and that the timing of the letter—after announcement of his decision to go ahead with the lease sale and two days after suit was filed on this matter in district court—does not render it ineffective in fulfilling the statutory requirement. 520 F. Supp. 1385.

Having concluded that the Secretary complied with the procedural requirements of Section 19 of the OCSLA and that his decision to reject Governor Brown's recommendation was not arbitrary or capricious, we affirm the district court's grant of summary judgment to appellants on this issue.

VII.

STANDING OF ENVIRONMENTAL GROUPS

The Natural Resources Defense Council, Inc., The Environmental Defense Fund, and various other environmental organizations sought standing to raise the CZMA issues raised by the State of California and the local governments. The district court denied them standing because the CZMA was not enacted for their "especial benefit," and treated the briefs of these parties as amici curiae.[4] Citing two recent Supreme Court cases, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); and *California v. Sierra Club*, 451 U.S. 287 (1981), the district judge held that these environmental groups had no implied right of action to bring claims under the CZMA. Assuming, *arguendo*, this holding is correct, it does not resolve the standing issue.

The environmental groups rely for standing not on an implied right of action under the CZMA, but on Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702. Addressing this point, the district court held that they may not rely on the APA as the sole jurisdictional predicate. In this the district court erred. The environmental groups relied on the APA for standing, not for federal subject mat-

[4] The district court dismissed the environmental groups and their claims from the lawsuit in a separate order of dismissal. NRDC v. Watt, No. 81-2081 (C.D. Cal. Aug. 18, 1981) (order of dismissal).

ter jurisdiction. We hold that the environmental groups have standing under 5 U.S.C. § 702. No remand is necessary, however, because the erroneous denial of standing did not affect the outcome of the case.

We first note that federal court jurisdiction is based on 28 U.S.C. § 1331, for civil actions arising under the laws of the United States, and is not at issue in this case. Second, an implied right of action under the statute violated is not a necessary predicate to a right to action under the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981).

Section 10 of the APA, 5 U.S.C. § 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

To have standing under this section both of the following questions must be answered affirmatively:

1. Has the party seeking standing suffered a legal wrong, or been adversely affected or aggrieved by the agency action (*i.e.*, has he been "injured in fact"), and,

2. Are the interests sought to be protected by the party seeking standing "arguably within the zone of interests to be protected or regulated" by the statute in question.

See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 151-53 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Glacier Park Foundation v. Watt*, *supra*, at 885.

A mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing. *Sierra Club v. Morton*, 405 U.S. 727 (1971); *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 752 (1982). Here, however, actual injuries to members have been alleged. The environmental groups claim that various of their members live, work, and enjoy recreational activities in the areas that will be affected by leasing of OCS tracts. They allege that their members' use of the coast and

waters for commercial and sport fishing, scientific research, tourist activities, and recreation is threatened by OCS leasing. Injuries of a noneconomic nature to widely-shared aesthetic and environmental interests, as well as economic injuries, can amount to sufficient "injury in fact" for standing under section 10. *Sierra Club v. Morton*, 405 U.S. at 734, *cited with approval in United States v. SCRAP*, 412 U.S. 669, 686 (1973); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975). Thus, the environmental groups' allegations establish sufficient "injury in fact" to permit an affirmative answer to the first question.

We also find that the alleged injuries are within the "zone of interests" to be protected by Section 307(c) of the CZMA. As already pointed out, section 307(c)(1) is part of a Congressional scheme to carry out the overall purpose of the CZMA, which is to protect the very resources the environmental groups claim are threatened. Congressional findings underlying the CZMA recognize "a national interest in the effective management [and] protection " of the coastal zone as well as in its development and beneficial use. Section 302(a), 16 U.S.C. § 1451(a). Congress expressed concern over the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion" that has been "occasioned by population growth and economic development, including . . . extraction of mineral resources and fossil fuels." 16 U.S.C. § 1451(c). We agree with the finding in *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), that "[a]lthough sensitive to balancing competing interests, [the CZMA] was first and foremost a statute directed to and solicitous of environmental concerns." 456 F. Supp. at 919. Thus, the allegations of the environmental groups permit an affirmative answer also to the second question.

The CZMA issues the environmental groups sought to raise were identical to those raised by the State of California and the local governments, parties who clearly had standing. Additionally, amici curiae briefs were filed by the

parties wrongly denied standing. Our review of the more than one thousand pages of the eighteen briefs filed in this case, as well as the extensive argument and our own research, convince us that no stone was left unturned in presenting all aspects of the CZMA issue to this court. Allowing additional parties to present the same arguments would not affect the outcome of this case. Therefore, to remand the case for additional proceedings because of the district court's error with respect to standing would constitute a waste of scarce judicial resources.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND STAYED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 81-2080 MRP

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

v.

JAMES G. WATT, ET AL., DEFENDANTS.

CASE NO. CV 81-2081 MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS.

FILED AUG. 18, 1981

OPINION

I. BACKGROUND

Plaintiffs in this case are the State of California, the California Coastal Commission (hereinafter referred to as "CCC"), the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation. (This case is hereinafter referred to as *California v. Watt.*) The Natural Resources Defense Council, Inc. (hereinafter referred to as "NRDC"), the Sierra Club, the Friends of the Earth, the Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereinafter collectively referred to as "environmental groups") are plaintiffs in the companion case. The plaintiffs in the companion case are associations who claim an interest in the coastal zone and its resources. (The companion case hereinafter referred to as *NRDC v. Watt.*)

Intervening as plaintiffs in the case of *California v. Watt* are certain cities and counties of the State of Claifornia

which are located on, or in proximity to, the California coast. The plaintiff-intervenors are County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Diego, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Monica, and City of Seaside (collectively referred to as "local governments").

The defendants are James G. Watt (the "Secretary"), acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management ("BLM").

Intervening as defendants in both actions are Western Oil and Gas Association ("WOGA"), Amoco Production Company, Atlantic Richfield Company, Cities Service Company, Conoco, Inc., Exxon Corporation, Elf Aquitaine Oil and Gas, Getty Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, and Shell Oil Company. WOGA is a regional trade association of companies and individuals in the petroleum industry. The remaining defendant-intervenors are oil companies which submitted high bids on one or more tracts offered in Lease Sale No. 53 on May 28, 1981.

Lease Sale No. 53 consists of a maximum offering of 243 designated tracts of the Outer Continental Shelf ("OCS") for mineral development. The tracts in Lease Sale No. 53 lie in five different basins off the coast of California—one of which is the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point conception in Santa Barbara County in the south.

Requesting injunctive and declaratory relief, plaintiffs claim that defendants have violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. This Court has jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act); 28 U.S.C. § 1361 (Mandamus); 5 U.S.C. §§ 701-706 (Administrative Procedure Act); 43 U.S.C. §§ 1349(a)(1), (b)(1) of the Outer

Continental Shelf Lands Act ("OCSLA"); the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(a)(1), (b)(1); and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*

There are no material issues of genuine fact in dispute in these two consolidated cases.

The following is a chronology of the events relating to the lease sale at issue in the two cases.

In November 1977, BLM issued a Call for Nominations for Lease Sale No. 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts which they believe should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors.

In October 1978, the Department of Interior announced the tentative tract selection for Lease Sale No. 53. The Santa Maria Basin contained 115 of the 243 tracts to be involved in the sale.[1]

A draft environmental impact statement ("DEIS") was released for public comment in April 1980. The DEIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale No. 53, was based on a resource estimate of 404 million barrels for the Santa Maria Basin.

On July 8, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale.

In September 1980, a final environmental impact statement (the "EIS") was released. Shortly before its publication, on or about August 28, 1980, the United states Geo-

[1] Although 243 tracts were originally to be considered for proposed Lease Sale No. 53, BLM later established that the total sale area would involve 242 tracts comprising 1.315 million acres.

logical Survey ("USGS") made available revised resource estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate, which almost doubled the previous estimate, was incorporated in an addendum to the EIS.

Also during the fall of 1980, BLM consulted with the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") concerning the jeopardy posed to any endangered or threatened species by Lease Sale No. 53. The NMFS rendered a biological opinion that Lease Sale No. 53 would not jeopardize the endangered gray whale. The FWS rendered a biological opinion that the sale would not jeopardize the threatened sea otter.

During this period, a Secretary Issue Document ("SID") was prepared by the Department of Interior. An SID is an internal document intended to aid the Secretary in making decisions concerning lease sales. The Department of Interior released the SID for Lease Sale No. 53 in October 1980.

On October 16, 1980, former Secretary of the Interior Cecil D. Andrus issued the proposed notice of sale for Lease Sale No. 53. The notice proposed leasing only within the Santa Maria Basin. Secretary Andrus deleted the four other basins from the proposed sale.

By letter of October 22, 1980, the Department of Interior notified the CCC of its "negative determination" that the preleasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone. In response to the negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 31 tracts (29 tracts in the final notice of sale) in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale No. 53 to be consistent with the California Coastal Management Plan ("CCMP"). (As 4 of the tracts were combined as 2 for sale purposes, the CCC resolution is actually directed to 29 tracts.)

On December 24, 1980, the Governor of California, Edmund G. Brown, Jr., responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 34 tracts located in the northern portion of the Santa Maria Basin. (Although the recommendation referred to 34 tracts,

4 of the tracts were combined as 2 tracts for sale purposes; therefore, only 32 tracts were actually encompassed by the Governor's recommendation.) Governor Brown's letter and enclosed recommendations were subsequently transmitted to the new Secretary of the Interior Watt by a memorandum from Deputy Assistant Secretary Heather L. Ross.

On February 10, 1981, Secretary Watt issued a revised proposed notice of sale for Lease Sale No. 53. The four basins previously deleted from the proposed sale were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposed notice to Governor Brown, Secretary Watt requested recommendations pursuant to § 19 of OCSLA, 43 U.S.C. § 1345.

By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale No. 53. He reiterated his position that, based upon the balancing test of § 19 of OCSLA, the northern 32 tracts should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale No. 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale No. 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin. In the communication sent to Governor Brown, Secretary Watt provided a brief explanation of the basin for his previous rejection of the recommendation.

Between the Call for Nominations on OCS Lease Sale No. 53 in November 1977 and May 1, 1981, the State of

California, its agencies and the local governments submitted to the Department of Interior more than 20 separate communications seeking the deletion or delay of the sale of tracts in the Santa Maria Basin. Excluding the call for nominations and the letter of May 1, the Department of Interior submitted at least three separate communications to the state or to the CCC in regard to the disputed tracts within Lease Sale No. 53.

On April 29, 1981, plaintiffs in *California v. Watt* and in the companion case of *NRDC v. Watt* filed this action. On May 27, 1981, the Court granted a preliminary injunction in *California v. Watt*. Subsequently, on July 10, 1981, the consolidated cases came on for hearing on cross motions for summary judgment.

With respect to the CZMA, 29 tracts in the northern portion of the Santa Maria Basin are at issue. (Due to the consolidation of 4 tracts into 2, the 31 tracts, as initially identified by Secretary Andrus in the October 1980 notice of sale, were viewed as 29 tracts at the time of the April 1981 final notice of sale.) The 29 tracts, numbered 129 to 155 and 158 to 161, range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). *See* Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Environmental Impact Statement ("EIS"), Vol. 1 at 1-9. Tract numbers 130, 131, 133, 134, 136 to 138, 140 to 151, 153 to 155, 160 and 161 are within 12 miles of the coastline. *See* Defendant's Exhibit L-G at 289-90 (letter from the State of California's Department of Fish and Game to the Resources Agency of the State of California). Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Administrative Record No. 411w (California Coastal Comm. Letter, April 8, 1981 at 2); Administrative Record No. 165w (CCC comments on the Draft Environmental Impact Statement ("DEIS") on Proposed OCS Lease Sale #53, June 4, 1980 at 2); Administrative Record No. 158w (U.S. Dept. of Interior, BLM Press Release, May 9, 1980); EIS at 1-10. Of these tracts, numbers 138, 142, 143, 146, 147 and 151 are within 6 miles of the shore, EIS at 2-18;

SID at 73; portions of tract numbers 130, 131, 134, 137, 141, 144, 145, 149, 150, 154, 155, 160 and 161 are within 6 nautical miles of the shore, EIS at 2-18, 2-19; Defendant's Exhibit L-G at 292-93.; letter from the Department of Parks and Recreation to the U.S. Dept. of Interior, Office of Planning and Research. The remaining tracts, numbers 129, 132, 135, 139, 148, 152, 158 and 159 range seaward from approximately 12.5 to 24 miles. *See* Administrative Record No. 511w (U.S. Dept. of Interior BLM Memorandum, June 4, 1981 at 3).

With respect to the other statutes, NEPA, OCSLA, ESA and MMPA, three additional tracts are in dispute. They are numbered 162 to 164. They also range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). Administrative Record No. 511 (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); EIS, Vol. 1 at 1-9.

II. THE COASTAL ZONE MANAGEMENT ACT

A. The Issue Presented

Plaintiffs in this case contend that the Final Notice of Lease Sale No. 53 "directly affects" the California coastal zone and, therefore, the Secretary of the Interior must conduct the pre-lease activities relating to Lease Sale No. 53 in a manner which is, "to the maximum extent practicable", consistent with the California Coastal Management Program (CCMP), pursuant to § 307(c)(1) of the CZMA. 16 U.S.C. § 1456(c)(1). Thus, the principal issue in this case with respect to the CZMA is whether the Secretary violated that Act by making a "negative determination" that no consistency review was required for the Final Notice of Lease Sale No. 53. *Id.*; 15 C.F.R. §§ 930.34-.35.

The threshold test for the application of § 307(c)(1) is whether the activity in question will have a "direct effect" on the coastal zone. If a federal agency determines that its proposed activity *will not* directly affect the state's coastal zone, it must provide the administrator of the state coastal program with written notice briefly setting forth the reasons for that conclusion. 15 C.F.R. § 930.35(d) (1980). That

notice is called a "negative determination". *Id.* On the other hand, if a federal agency determines that the activity in question *will* directly affect the coastal zone, the federal agency must provide the administrator of the state coastal program with a written notice; called a "consistency determination", that the activity will be carried out in a manner which conforms with the state program. 15 C.F.R. § 930.34(a) (1980).

The issue is squarely presented in this case of first impression: does the Final Notice of Sale with respect to the 29 tracts in the northern portion of the Santa Maria Basin directly affect the coastal zone of the State of California? The resolution of this issue turns on an interpretation of the phrase "directly affect" as it is used in the CZMA.

Established rules of statutory construction require that the Court turn first to the "language in which the act is framed, and if that is plain, . . . to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). If the meaning of the statutory text is clear and unambiguous, the Court's task is minimal. That is not the case here as the language of § 307(c)(1) is neither clear nor ambiguous.[2] The Act itself provides no definition of the key terms employed in the section. Thus, in order to construe and interpret § 307(c)(1), the Court is required to turn to the Act's stated purposes, the legislative history, and the interpretations of agencies charged with administering the Act.

B. The Statutory Purpose

Effectuating the purpose of a statute should be a primary concern of a court in construing the meaning of disputed language within it. *Philbrook v. Glodgett*, 421 U.S. 707,

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[2] During the 1980 Oversight Hearings held before the House Subcommittee on Oceanography, Chairman Gerry E. Studds remarked, "I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections". Proposed Amendments to the CZMA: Hearings on H.R. 6956 and H.R. 6979 before the Subcommittee on Oceanography of the House Committee on Merchant Marine & Fisheries, 96th Cong., 1st and 2d Sess. 88 (1980).

713 (1975), quoting *United States v. Heirs of Boisdor 'e*, 8 How. 113, 122 (1849). Further, a court should not ignore policy considerations in favor of mechanical interpretation in seeking the proper construction of a statute. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980), citing to *United States v. Anderson*, 76 U.S. 56, 65-66 (1869). Thus, the question of which activities fall within the scope of 307(c)(1) must be considered in light of the statutory purpose of the CZMA.

The CZMA was enacted in order to provide comprehensive, coordinated planning for the protection and beneficial use of the resources of the coastal zone. 16 U.S.C. §§ 1451, 1452. Special emphasis was placed on the objective of preserving the natural resources within this area "for this and succeeding generations". 16 U.S.C. § 1452(1). In enacting the CZMA, Congress intended to establish an effective scheme for the long-term management of the valuable resources found within the coastal zone of the United States.

The "key" to the management scheme envisioned by Congress is "to encourage the states to exercise their full authority over the lands and waters in the coastal zone". 16 U.S.C. § 1451(i). This authority granted to the states is to be exercised "in cooperation with Federal and local governments and other vitally affected interests". *Id.* Thus, the primary authority in the management scheme is to be bestowed upon those coastal states which develop and implement comprehensive management programs for their respective coastal areas.

While the Act assigns final responsibility for management to states with such a program, the federal agencies are given significant power over the policy choices which a state incorporates into its coastal management plan. Under the Act, the Secretary of Commerce may not give the required approval to the State's proposed plan "unless the views of Federal agencies principally affected by such program have been adequately considered". 16 U.S.C. § 1456(b). Another prerequisite for the approval of the Secretary of Commerce is finding that the state's program

"provides for adequate consideration of the national interest". 16 U.S.C. § 1455(c)(8).

To induce the states to develop and implement comprehensive management programs in accord with the views of federal agencies, Congress provided that federal activities are to be consistent with the approved state management program.[3] To this end, Congress designated five categories of federal actions which are subject to the requirement of a consistency review.

The consistency provisions under the CZMA, each subjecting particular categories of federal actions to review, are: (1) federal activities, conducted or supported by a federal agency, which directly affect the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal licenses or permits where the proposed activities will affect land and water uses in the coastal zone; (4) OSC post-lease sale activities which require a federal license or permit and will affect any land use or water use in the coastal zone; and (5) federal programs which provide funding to state and local governments for projects which will affect the coastal zone §§ 307(c)-(d), 16 U.S.C. §§ 1456(c)-1456(d). Administrative procedures have been established to facilitate the implementation of the consistency requirements under the Act.[4]

Obviously, one incentive for state participation in a federal coastal management program is the federal funding for the program. 16 U.S.C. §§ 1454, 1455. The grants, however, are of limited duration. Thus, in reality, the requirement of consistency review is the principal permanent in-

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[3] Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Envt'l. Affairs L. Rev. 429, 433 (1981).

[4] The federal agency makes an initial determination whether its activity "directly affects" the coastal zone. 15 C.F.R. § 930.33(a) (1980). The federal agency must evaluate its activity in light of the provisions of the state's coastal management program. 43 Fed. Reg. 43,590 (1977). If the federal agency determines that the activity will directly affect the coastal zone, it must provide the state with a "negative determination". *Id.* § 930.35(d). Mediation is available in the event that the federal agency and the state disagree as to the propriety of a negative determination or the validity of a consistency determination. *Id.* §§ 930.110-115. *See Linsley, supra*, 438-440.

ducement to the state's development of a coastal management plan. There is therefore a *quid pro quo* in the legislative scheme[5]; the state agencies are to participate actively in designing the state management program, and, in return, the federal agencies "*shall* conduct" their activities "in a manner which is, to the maximum extent possible, consistent" with the state's program 16 U.S.C. § 1456(c) (emphasis added).

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§ 1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

Any interpretation of the phrase "directly affect" must give due consideration to the reciprocal roles intended to be assigned to federal agencies and to the states. The states are intended to have a significant role in essential planning and coordination for the development of the coastal zone.

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[5] Schoenbaum & Parker, Federalism in the Coastal Zone, 57 N.C. L. Rev. 231, 239 (1979).

They are intended to be involved in every stage of the planning from drawing board to execution.

Special grants are offered to induce the states to create federally-approved comprehensive management plans which provide for inter-governmental cooperation. California designed and created such a plan.[6] It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose.

Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage, which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the sale and the stipulations to which the leases are subject.[7] Each of these are key Outer Continental Shelf (hereinafter referred to as the OCS) planning decisions. The selection of tracts to be let determines where the lessee can explore and produce oil and gas. The decision to offer or delete various tracts also determines which estuaries, reefs, wetlands, beaches, or barrier islands are exposed to the risk of oil spills and which are not. The particular stipulations imposed on the lessors, along with the designated location of the tracts, influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction. Stipulations

[6] The California Coastal Management Program ("CCMP") is the program adopted by California pursuant to the CZMA. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978).

[7] Absent special circumstances, no tract leased on the OCS is to exceed 5,760 acres. 43 U.S.C. § 1337(b)(1). The lessee is entitled to explore, develop and produce the oil and gas found within the area of that tract.

included in the lease determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts. In addition, decisions made during the pre-leasing stage establish the timing of OCS development and production.[8] Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development.

The purpose of the act would be not be furthered by excluding the states from the critical decision-making relating to oil and gas resources in the OCS. If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decision-making envisioned by the draftsmen of the CZMA.

C. The Legislative History of the CZMA

The legislative history, while somewhat inconclusive, sheds some light on the Congressional intent in enacting this provision. As the Act was first passed in 1972, amended in 1976 and in 1980, Congress has had ample opportunity to debate the legislation. The text of § 307(c)(1) in the original bill, as passed by both House and Senate, provided that all federal activities "in the coastal zone" were subject to § 307(c)(1). Without explanation, the Conference Committee altered the language and substituted the phrase "directly affecting the coastal zone" for "in the coastal zone". On balance, this substitution seems to have been intended to expand the scope of the provision. Activities occurring outside of the coastal zone, such as OCS activities, as well as activities within the coastal zone, were made subject to consistency review. A caveat, however,

[8] The original lease is valid for a period of 5 to 10 years. 43 U.S.C. § 1337(b)(2).

was appended to the revision. In order to be subject to consistency review, the effect must be "direct". The 1972 legislative history is silent as to the import of this change.

In 1976 Congress amended the CZMA. Coastal Zone Management Act Amendments of 1976, Pub.L.No. 94-370, 90 Stat. 1013 (1976) (amending 16 U.S.C. §§ 1451-1464). Section 307(c)(1) was not amended, and the legislative history of the 1976 amendments does not address this particular provision. However, there are references within the legislative history to the question of the applicability of consistency requirements to the decision to lease. Certain statements relate to the purpose of the Act as a whole. The Senate Report expressed concern that "[t]here is very little coordination or communciation between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.... Full implementation of the Coastal Zone Management Act of 1972 ... could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act". S. Rep. No. 94-277, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S. Code Cong. & Ad. News 1770.

During its consideration of the 1976 Amendments, Congress did address a different subsection within the same section of the 1972 Act—307(c)(3), now § 307(c)(3)(A). That subsection requires that applicants for a federal permit or license for an activity affecting the coastal zone include in the application a certification of consistency of the proposed activity with the state's coastal management program. Both the House and the Senate concluded that Congress had intended that the "consistency clause" (i.e., § 307(c)(3)) in the 1972 act apply to Federal leases for offshore oil and gas. S. Rep. No. 94-277, *supra*, 19-20, 36-37, 53-54, 59; H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 4, 52-53, 67-68. Nevertheless, by amendment on the floor of the House, the explicit requirement of consistency certification for offshore leasing was deleted from § 307(c)(3). 122 Cong. Rec. 6128. The final version of § 307(c)(3) imposed no consistency certification requirement on the lessee.

Defendants infer from the Congressional decision to exclude leasing from the consistency certification process under § 307(c)(3) an intention to exclude pre-leasing activities from all consistency review. They assert that § 307(c)(3) supersedes § 307(c)(1). Thus, defendants read the Congressional silence as to the continuing validity of § 307(c)(1) as a repeal by implication.

The Supreme Court has consistently applied the "cardinal rule ... that repeals by implication are not favored". *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Wood v. United States*, 16 Pet. 342-343, 363 (1842). In the absence of an affirmative showing of an intention to repeal, effect must be given to each section of the statute. *Id.* Where there is no "positive repugnancy" between the two provisions, the subsequently enacted provision does not repeal the previously enacted provision. *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939).

There is no "repugnancy" between § 307(c)(1) and 307(c)(3). The former subsection imposes obligations on the federal government which in the present context is the lessor, whereas the latter subsection imposes obligations on private sector applicants for a federal license or permit, which in the present context are the lessees. Certainly the legislative history for the 1976 Amendments does not imply any intention to make § 307(c)(3) the exclusive mode of invoking consistency review. Under § 307(c)(3), consistency requirements are imposed on the specific activities relating to permits and licenses, whereas under § 307(c)(1), consistency requirements are imposed on a residual category of federal actions which are neither development projects nor related to permits and licenses. 15 C.F.R. § 930.31 (1980); *see* 44 Fed. Reg. 37,146 (1979) (NOAA's comment to 15 C.F.R. § 930.31 (1979)).

In 1980, Congress reauthorized the CZMA. Coastal Zone Management Improvement Act of 1980, Pub. L. 96-464, 94 Stat. 2060 (1980). Congress amended certain sections of the Act, but did not alter any of the section 307 consistency provisions. Both the House and Senate Committees acknowledged the existence of a disagreement over the applicability of the consistency provisions to the final notice of

OSC lease sale.[9] In order to clarify the intent of these provisions, the House Committee explained in its report accompanying the 1980 amendments that the 1976 amendments to § 307 "did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases."[10] H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 28, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4376. The Senate Committee specifically discussed the relationship between section 307(c)(1) and OCS pre-lease activities:

> The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.

S. Rep. No. 783, 96th Cong. 2d Sess. 11 (1980).

The 1980 Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R. Rep. No. 96-1112, 96th Cong., 2d Sess. 34-35, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4382-83. Referring to earlier congressional deliberations, the House Committee presented two alternative definitions of the phrase "directly

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[9] "The committee is cognizant of one disagreement between California and the Department of Interior which led to a resolution effort through formal mediation proceedings conducted by the Department of Commerce". H. Rep. R. No. 96-1012, 96th Cong., 2d Sess. 34, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4382. *See also* S. Rep. No. 96-783, 96th Cong., 2d Sess. 11.

[10] There was no conference report on the Coastal Zone Management Improvement Act of 1980. After the language of the Senate bill was amended to contain the text of the House bill, the Senate bill was passed in lieu of the House bill. [1980] U.S. Code Cong. & Ad. News 4362. Under these circumstances, the House Report should be accorded greater weight than might be appropriate if there were a more authoritative source from which to glean the intent of the legislature as a whole. *See* D. Sands, 2A Sutherland Statutory Construction § 48 (1973).

affecting". The threshold test applies "whenever a Federal Activity ha[s] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies". *Id.* at 34. As an alternative phrasing of the threshold test, the House Committee stated that the Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence". *Id.* Congress indicated its support of an "expansive interpretation of the threshold test". *Id.* at 35. In order to effectuate the purposes of the Act, consultation between federal and state agencies should occur "at the earliest practicable time". *Id.* at 34; *see also* S. Rep. No. 783, *supra*.

Defendants contend that the 1980 legislative history is not entitled to great weight. They argue that, in interpreting the intent of the body which enacted the statute, no deference is due to statements of a "post-enactment Congress". In support of this review, defendants cite a frequently quoted dictum: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States v. Price*, 361 U.S. 304, 313 (1960).

The present situation is readily distinguishable from that in *United States v. Price*. There the inferences of legislative intent did not flow from explicit Congressional statements, but from Congressional inaction on amendatory legislation. The sole passing reference by Congress to the disputed provision was characterized by the court in *United States v. Price* as "a slender reed". *Id.* at 304. In contrast, the recent legislative history of the CZMA contains statements of great significance from both houses of Congress.

While subsequent legislative history generally is not controlling, neither should subsequent congressional interpretation be "rejected out of hand". *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n. 8 (1980). While acknowledging that the admonition propounded in *United States v. Price* remains sound, the Supreme Court explained in *Andrus* that a court should nevertheless give appropriate weight to arguments predicated upon congressional actions. *Id.* The

court should not overlook valuable sources in the search for legislative intent. *See Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974).

Here, the 1980 legislative history has special relevance. In reauthorizing the 1972 Act, Congress made explicit references to the provision in dispute, as well as to the very phrase within the disputed provision. This Court is bound to give careful consideration to the explicit statements made by the 1980 Congress during its reauthorization of the CZMA.

Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act.

D. Interpetation by Reference to Related Statutes

The defendants argue that the Secretary's obligations under § 307(c)(1) must be interpreted in light of his obligations under OCSLA, as well as under NEPA and ESA. An expansive interpretation of the Secretary's duties under § 307, according to defendants, would create a conflict with the functions and purposes of the other applicable statutes affecting the OCS.

As to the relationship between OCSLA and the CZMA, defendants contend that to impose the requirement of consistency review on pre-leasing activities would nullify § 19 of OCSLA which provides for the Secretary's consideration of recommendations submitted by a state governor. 43 U.S.C. § 1345. Defendants explain that the scheme of regulation of the OCS as set forth in the 1978 Amendments of OCSLA, Pub. L. No. 95-372; 92 Stat. 629 (1978), accords the Secretary the authority to direct development of the OCS. In defendants' view, the construction of the CZMA urged by plaintiffs would result in a substitution of the state's judgment of the Secretary's, contrary to the intent

of Congress as expressed in the amendments to OCSLA. Therefore, defendants urge the Court to give "overriding weight" to § 19 of OSCLA in construing § 307 of the CZMA.

At the outset, it should be noted that the CZMA has certain unique objectives which set it apart from the other statutes relied upon by defendants. NEPA, OCSLA, ESA, and the CZMA share the common goal of preserving and protecting the nation's resources.[11] Only the CZMA was intended to encourage active participation of state and local governments in developing and implementing the plans for meeting the common goal.[12] In the remaining statutes, Congress imposes certain responsibilities on the federal government and federal agencies without mandating participation by the states into the statutory scheme.

Although both the CZMA and OCSLA focus on offshore oil and gas leases, there is a marked difference in the central focus of each statute. *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979). Under OCSLA, the emphasis is upon development of oil, gas and other minerals. In contrast, the CZMA is a statute directed to, and solicitous of,

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[11] The CZMA was enacted by Congress "to preserve, protect, develop, and, where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(a).

OCSLA directs the Secretary of the Interior to prescribe rules and regulations deemed "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein." 43 U.S.C. § 1334(a)(1).

NEPA recognizes that "each person has a responsibility to contribute to the preservation and enhancement of the environment". 42 U.S.C. § 4331(c). *See also* 42 U.S.C. § 4331(b).

Principal purposes of the ESA are to "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species". 16 U.S.C. § 1531(b).

[12] *See* 16 U.S.C. § 1452. As one commentator observed, the CZMA "reflects a strong congressional intent to give states and their delegates a more significant management role than the national government". Finnell, Federal Regulatory Role in Coastal Land Management, 1973 American Bar Foundation Research Journal 173, 249-250.

environmental concerns. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Due to this significant difference in objectives between CZMA and the other statutes, it is doubtful that it would be proper to interpret the CZMA in light of the other statutes.

Obviously, the court must construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression. *Get* 95th Cong., 2d Sess. 153, n.52, *reprinted in* [1978] U.S. Code & Cong. Ad. News 1559.

An analysis of the rights and duties imposed by the two statutes reveals the mode of "co-existence" of the CZMA and OCSLA. Although both provisions focus on the leasing process, neither the obligations imposed nor the parties involved in the two provisions are identical. Section 19 of OCSLA requires that the Secretary consider recommendations submitted by the governor of the state where the lease sale is to be held. 43 U.S.C. § 1345. Once the Secretary has made certain determinations with regard to the recommendation, his decision to accept or reject the recommendations is final. In contrast, § 307(c) of the CZMA does not require that the Secretary evaluate such recommendations. The frame of reference for the Secretary's determination under the CZMA is the state's coastal management plan. The CZMA does not deprive the Secretary of the opportunity to regulate size, timing or location of proposed lease sales. No absolute veto power has been bestowed upon plaintiffs by § 307(c)(1). Instead, the CZMA provides a more complete opportunity for federal-state consultation and cooperation. In the event serious disagreements arise between the state and the federal government as to the propriety of the federal agency's determination, either part may seek mediation. 16 U.S.C. § 1456)h); 15 C.F.R. § 930.113-116.

In claiming that § 19 of OCSLA denies the states the right to participate in consultation or coordination of pre-leasing activities, defendants rely on *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979). In *California v. Kleppe*, the Ninth Circuit focused on the question whether Congress in-

tended the Secretary of the Interior or the Environmental Protection Agency to promulgate air quality regulations for the Outer Continental Shelf. The Secretary claimed authority to promulgate the regulations pursuant to OCSLA, while the EPA claimed authority to do so under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* Looking to the legislative history and the language of the 1978 amendments to OCSLA, the court found no indication that Congress had contemplated "dual jurisdiction" of the Secretry and the EPA over OCS activities which affect air quality. *California v. Kleppe, supra* at 1194. According to the court's analysis, there is no suggestion that the Secretary is to share authority to promulgate air quality regultions for the OCS. *Id.* at 1193.

The present case is readily distinguishable from *California v. Kleppe.* In contrast, here Congress did contemplate concurrent authority of the state and the federal agencies over the coordination of OCS activities. Although the savings clause, § 608 of OCSLA, 43 U.S.C. § 1866, does not explicitly portect whatever authority EPA might have had pursuant to its jurisdictional grant under the Clean Air Act, 42 U.S.C. § 7607(b)(1), it does explicitly provide that the requirements under the CZMA are neither modified nor repealed by the 1978 Amendments to OCSLA. The duties imposed on the Secretary under OCSLA are compatible with the duties imposed under the CZMA. Enforcement of the requirements of § 307 of the CZMA will not frustrate the Secretary's authority under OCSLA to make the resources of the OCS "available for expeditious and orderly development, subject to environmental safeguards". *See* 43 U.S.C. § 1332(3). Participation in the consultation process envisioned by the CZMA will, in fact, further the purposes of the CZMA.

Even though the obligations imposed on the Secretary under the CZMA do not impair his authority under OCSLA, it is conceded that the Secretary may be confronted by the complex task of resolving competing interests and balancing the numerous priorities set by Congress. Also, some delays are inherent in a planning process involving participants at all levels of government. But, it is not

the proper function of the judiciary to question the means Congress has chosen to manage the resources of the coastal zone. This is a matter committed to legislative judgment. *Cf. Hodel v. Virginia Mining and Reclamation Assoc.*, 49 U.S.L.W. 4654 (June 15, 1981).

E. NOAA's Interpretation

The administrative agency's inerpretation of a statutory provision also aids the Court in its determination of the legislative intent of the CZMA. It is a settled principle that an agency's interpretation of a statute is normally entitled to deference from the courts. *Train v. NRDC*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1 (1965); *see also American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978). Here, the National Oceanic and Atmospheric Administration ("NOAA") is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *See American Petroleum Institute v. Knecht, supra*, at 908. During enactment of the 1976 amendments, Congress specifically directed NOAA to clarify certain requirements of the Act and thus affirmed the responsibility NOAA had assumed in administering the 1972 Act. The fact of NOAA's technical expertise in matters relating to the nation's coasts also suggests that deference should be accorded to its continuing construction of this Act. *See Ethyl Corp. v. Environmental Protection Agency*, 176 U.S. App. D.C. 373, 541 F.2d 1 (1976).

Until May 1981, NOAA consistently took the position that Interior's pre-leasing activities were subject to consistency review. For instance, in 1977, NOAA responded to a request to clarify the statutory language in the consistency provisions of § 307. NOAA then stated that it was "considering a position which treats the Department of the Interior's prelease sale decisions, such as tract selections and choice of lease stipulations, as a 'Federal activity' subject to the requirements of § 307(c)(1) of the Act". 42 Fed. Reg. 43586, 43591 (1977) (comment accompanying second set of proposed regulations). In light of the dispute between Interior and Commerce as to the applicability of the § 307(c)(1)

consistency requirements to the OCS leasing process, NOAA refrained from taking a firm position at that time. *See* 42 Fed. Reg. 43592; 43 Fed. Reg. 10510, 10512 (1978).

NOAA's final regulations in 1978 were based upon a liberal construction of all threshold tests triggering consistency review under § 307. NOAA concluded that § 307(c)(1) (as well as the following subsections) was intended to apply to "all Federal actions which were *capable* of significantly affecting the coastal zone".[13] 43 Fed. Reg. 10510, 10511 (1978) (emphasis added). Favoring broad inclusion of federal activities in the process of consistency review, NOAA concluded that a federal action would meet the threshold test under § 307 even when cumulative effects are determined to be beneficial.[14] 43 Fed. Reg. 10510, 10519 (1978) (to be codified at 15 C.F.R. §§ 930.10-.145).

The NOAA regulations, as amended in June 1979, reflect the view that pre-leasing activities fall within the purview of § 307(c)(1). 44 Fed. Reg. 37142-43, 37146-47 (1979) (comment to 15 C.F.R. § 930.33 (1979)). In support of its view, NOAA explained that "[i]mplementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts". 44 Fed. Reg. 37142. According to NOAA's comment, "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases to favor inclusion of Federal activities subject to consistency review". *Id.* at 37146-47.

As recently as April 1980, NOAA reiterated this view. In a letter dated April 9, 1980, addressed to State Coastal Management Program Directors, the Assistant Administra-

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[13] As discussed *infra* at p. 37, the Court, in accord with the opinion letter issued by the Department of Justice, rejects the specific definition promulgated by NOAA in the 1978 regulations, in which a "significantly affecting" test is substituted for the "directly affecting" threshold test of § 307(c)(1). The rejection of NOAA's definition is not intended to imply a rejection of the general position of the agency to whom the Department of Commerce has delegated its functions pursuant to the CZMA. Deference to NOAA's support of a liberal construction of the threshold test does not require the adoption of NOAA's exact language in defining a statutory phrase.

[14] *See* Schoenbaum & Parker, *supra* note 4, at 231.

tor of NOAA stated its view that "Federal consistency requirements subject final notices of OCS sales to consistency determinations". Ex. L-16.

In sum, NOAA's regulations and the comments thereto consistently supported the application of § 307(c)(1) to final notices of OCS sales. The view of the agency charged with implementing the CZMA, established over a long period of time, is certainly entitled to deference.

Recently, however, NOAA's position has changed abruptly. On May 14, 1981, approximately two weeks after the complaints were filed in the present cases, NOAA published a notice of proposed rulemaking in which it defined "directly affecting". 46 Fed. Reg. 26658, 26659 (1981). The definitions adopted by NOAA represent a complete departure from previous interpretations of the threshold phrase. According to NOAA's newly proposed definition, a federal activity directly affects the coastal zone only "if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval". *Id.* In the comments to this notice, NOAA listed lease issuance as an example of an activity which would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26660. On July 2, 1981, NOAA issued its notice of final rulemaking which reiterated the view of the consistency requirements under the CZMA, as first announced less than two months earlier.

The new notice of rulemaking is not entitled to special deference here. The Secretary's negative determination was made more than a year before these regulations were issued. Federal defendants admit that these regulations have "no direct bearing on the validity of the Secretary's interpretation". Federal Defendants' Summary Judgment Memorandum at 32, n.4. There is the ever-present danger that regulations proposed subsequent to the initiation of the litigation are self-serving; thus, they are generally suspect. As newly proposed regulations at variance with the previous regulations, they do not reflect a well-established agency interpretation. Therefore, a principal rationale sup-

porting deference to the agency is absent. *See Ethyl Corp. v. EPA, supra; cf. FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Also, the Court finds that this newest interpretation is inconsistent with the CZMA's policy of furthering long-range planning for coastal resources. The Court is "not obliged to stand aside and rubber-stamp an administrative position deemed inconsistent with a statutory mandate". *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Here the position is inconsistent not only with statutory policy, but with the agency's own interpretation during the past four years. Therefore, the Court concludes that although NOAA's long-standing interpretation of the consistency requirements is entitled to deference, NOAA's new interpretation, first proposed in May 1981, is not.

F. Applicability of Dictionary Definitions

Defendants contend that the phrase directly affects should be construed by reference to the definition of "directly" found in Webster's dictionary. Webster's New International Dictionary (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

1. a. without any intervening space or time; next in order; squarely, exactly,
   b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
   b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
   c. without divergence from the source or the original;
   d. simultaneously and exactly or equally.
3. in close relational proximity.
4. a. without intervening agency or instrumentality of determining influence; without any intermediate step;
   b. in the exact words of the original; verbatim.
5. a. in independent action without any sharing of authority or responsibility;

b. face-to-face, in person.

6. a. without a moment's delay; at once, immediately;

b. after a little, in a little while, shortly, presently.

According to defendants, the "plain meaning", based upon the dictionary definition, is "effects resulting from an activity without an intervening cause". Federal Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment at 14. Defendants' invocation of the plain meaning rule to support their choice among rival definitions of an inherently vague phrase should not be allowed to cloud the issue. As one commentator has warned, reliance on the plain meaning rule is too often merely "verbal table thumping to reinforce confidence in an interpretation arrived at on other grounds". Sands, 2A Sutherland Statutory Construction, § 46.01 at 49 (3d ed. 1973).[15] Use of the plain meaning label is simply a subterfuge in the present case. Although Webster offers six alternative definitions, defendants ignore four of the six meanings without explanation. Moreover, their choice of phrasing—"effects resulting from an intervening cause"—is not identical to any definition presented by Webster; it merely incorporates a portion of two of the six alternatives.

The defendants' construction of the phrase would produce an unreasonable result. The doctrines of intervening cause of proximate cause are familiar guiding principles in the law of torts, but there is no basis for importing those concepts into the present context. The doctrine of intervening cause was created by the courts to limit the extent of the defendant's liability for damages in tort. W. Prosser, Law of Torts § 44 (4th ed. 1971). It has no relevance in construing the CZMA which has the purpose of providing long-term planning for the presentation and management of coastal resources. Where the "plain meaning" would produce a result at odds with the policy of the statute in question, the Court should look to the purpose of the legislation rather than to a definition borrowed from another context.

[15] *See also* Merz, The Meaninglessness of the Plain Meaning Rule, 4 Dayton L. Rev. 31 (1979).

Trustees of Indiana University v. United States, 618 F.2d 736 (Ct. Cl. 1980). The dictionary definitions advanced by the defendants are clearly contrary to the congressional intent and, if applied, would thwart the objectives of the CZMA. In fact, as they must admit, if the definitions urged by the Secretary and the intervenor defendants were adopted, the issuance of the final notice of lease sale would require a consistency determination only in the rarest case. Such a result would not be in furtherance of the stated policies and goals of the CZMA.

Finally, although not necessary to this decision, it should be noted that if defendants' definition were applied in construing the threshold test under § 307(c)(1), the Court need not reach a contrary result. There are cases supporting the view that a lessor may be held liable for activities carried on by the lessee where land was leased for the purpose of carrying on the very activity which caused the harm. *See, e.g., Green v. Asher Coal Mining Co.*, 377 S.W. 2d 68 (Ky. 1964); *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964); *Daigle v. Continental Oil Co.*, 277 F. Supp. 875 (W.D. La. 1967); *Benton v. Kernan*, 130 N.J. Eq. 193, 21 A.2d 755 (1941). In *Green v. Asher Coal Mining Co., supra*, the court held that the owner of land leased for strip mining purposes could be held liable for injury arising out of the acts of the lessee. The court reasoned that an owner cannot escape liability by showing that he did not personally create the condition or commit the wrongful act, if the expected operations under the lease result in an injury that might have been reasonably anticipated. *Id.* at 72. Similarly, in *Daigle v. Continental Oil co., supra*, a lessor of land on which the carbon black plant of lessee was located was held liable to adjacent property owners for damage caused by emission of carbon black and coke dust from the plant.

In these cases, the parties did not frame their arguments in terms of intervening cause. The results, however, comport with a finding of no intervening cause.[16] The cases

[16] As defined in Black's Law Dictionary (5th ed. 1979):

> The "intervening cause," which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the nat-

stand for the proposition that the lessor is not automatically relieved of liability for activities conducted by his lessee; that is, the lessee's involvement in the tortious conduct does not necessarily constitute intervening cause. Therefore, preleasing activities could have direct effects even if "direct" is defined on the basis of tort concepts. Defendants cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized. The lessor of vast tracts in the OCS where sizable oil reserves have been estimated to exist "reasonably anticipates" effects in the coastal zone as a result of oil exploration, development, and production to be conducted by the lessees. The reasonable anticipation of these effects is obvious.

G. The Opinion Letter of the Department of Justice

In construing the ambiguous language within § 307(c)(1), the court must also give serious consideration to the opinion letter written by the Department of Justice on April 20, 1979. Ex. L-A. *Cf. Train v. NRDC*, 421 U.S. 60 (1974). The Department of Interior, charged with administering leasing activities in the OCS, and the Department of Commerce, responsible for the approval of state coastal management programs under the CZMA, disagreed as to the applicability of the consistency requirements of § 307(c)(1) to the OCS pre-leasing activities of the Secretary of Interior. In its opinion letter, the Department of Justice expressly repudiated Interior's contention that its pre-lease activities were *per se* exempt from the consistency requirement of § 307(c)(1). After analyzing the legislative history, the interrelationship of two of the consistency provisions, and

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ural sequence of events, and produces a result which would not otherwise have followed and *which could not have been reasonably anticipated.* (Emphasis added).

Thus, when the court in *Green v. Asher Coal Mining Co.*, 377 S.W. 2d 68 (Ky. 1964), employed the phrase "reasonably anticipated" in describing the causal connection between the leasing and the injury for which the lessor could be held liable, the court in effect concluded that none of the events subsequent to the leasing constituted intervening cause. *Id.* at 72.

the significance of subsequent legislation concerning the OCS, the Department of Justice concluded that "pre-leasing activities of the Secretary of Interior are subject to the conformity requirement of § 307(c)(1)". Ex. L-A at 13. Thus, the opinion lends further support to the Court's interpretation of the scope of the requirement in light of the legislative history and purpose of the statute.

The opinion letter does not attempt to resolve the problem of the proper definition of the phrase "directly affects". However, it does reject the substitution of the term "significantly" for the statutory term "directly". In the view of the Department of Justice, the legislative history does not justify this substitution. The Court concurs in this view.

The opinion did not reach the question whether the particular lease sale out of which the dispute arose[17] did directly affect the coastal zone. According to the Department of Justice, the question whether particular pre-leasing activities affect the coastal zone is one of fact and thus the Department was not authorized to answer the question. Ex. L-A.

H. The Direct Effects of Lease Sale No. 53

Although the Court is convinced that a final notice of lease sale would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical—it declines to hold that the final notice of lease sale is a generic category of federal activity which directly affects the coastal zone within the meaning of 307(c)(1). The Court agrees with the Justice Department that the determination as to whether the final notice of lease sale directly affects the coastal zone must be made on a case-by-case basis.

On these facts, the Court has no difficulty in finding such a direct effect. There is ample evidence within the administrative record that the Notice of Lease Sale No. 53 directly

[17] The dispute arose out of Lease Sale No. 48 involving 148 OCS tracts off southern California. The lease sale was held on June 29, 1979. Ex. L-27 (Summary of Mediation Conference between California and the Department of Interior, Oct. 19, 1979); Ex. L-7 (Mediator's Memorandum for the Secretary of Commerce, Jan. 25, 1980); *see also* Linsley, *supra* note 2 at 454-461.

affects the coastal zone and, thus, satisfies the threshold test under § 307 of the CZMA.

For example, a reading of the notice itself reveals some of the many consequences of leasing upon the coastal zone. The "Notice of Oil and Gas Lease Sale No. 53 (Partial Offering) as published in the Federal Register,[18] announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulations result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required; the Department of Interior, as lessor, specifically reserves the right to regulate the placement of "any pipeline used for transporting production to shore". Lessees must agree, pursuant to Stipulation No. 1, to preserve and protect biological resources discovered during the conduct of operations on the leased area.

The Secretarial Issue Document ("SID"), prepared in October 1980 by the Department of Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of a oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%.[19] Both the SID and the EIS contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 spills are expected during the project conducted in the Santa Maria subarea. *See* SID at 190; *see also* EIS at 4-1 to 4-16. According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

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[18] 46 Fed. Reg. 23674 (1981), Ex. L-4.

[19] *See* Table 3 in FWS letter of September 18, 1980, appended to SID, Ex. L-C at 205. This figure repreents the overall probability that one or more oilspills of 1,000 barrels or more will occur during the lifetime of the project and impact designated targets within 30 days. The FWS considers the data concerning the impact upon the sea otter range within 30 days to be the "primary data that should be considered when assessing possible effects on sea otters". Ex. L-C at 189.

In addition, both the SID and the EIS list a multitude of impacts arising out of the operations in the leasing area of Lease Sale No. 3. The EIS, prepared by the BLM at the request of the Department of the Interior, includes a section entitled "Unavoidable Adverse Impacts"; the SID discusses the same factors under the caption"Multi-Use Conflicts". Disregarding the titles, the information contained in these sections is indicative of the consequences flowing from the Notice of Lease Sale 53 to the coastal zone. Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socio-economic factors. EIS at 4-183 to 4-186; SID 80-132. For instance, the EIS states that "[n]ormal offshore operations would have unavoidable effects ... on the quality of the surrounding water". Pipelaying, drilling, and construction, chronic spills from platforms, and the discharge of treated sewage contribute to the degradation of water quality in the area. EIS at 4-183. As to commercial fisheries, drilling muds and cuttings "could significantly affect fish and invertebrate populations"; the spot prawn fishery in the Santa Maria Basin is particularly vulnerable to this physical disruption. EIS at 4-184. In reference to recreation and sportfishing, the EIS indicates the possibility of adverse impacts as a result of the competition for land between recreation and OCS/related onshore facilities as a result of the temporary disruption of recreation areas caused by pipeline burial. EIS at 4-184 to 4-185. There are the additional risks of "the degradation of the aesthetic environment conducive to recreation and the damage to recreational sites as a result of an oil spill". EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of the oil and gas operations. EIS at 4-185. Impacts on the level of employment and the size of the population in the coastal region are also predicted. EIS at 4-54.

The SID notes that there are artifacts of historic interest as well as aboriginal archaeological sites reported in the area of the Santa Maria tracts. SID at 119. The FWS and NMFS biological opinions, appended to the SID, indicate the likeli-

hood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale. SID at 146.

These effects constitute only a partial list. Further enumeration is unnecessary. The threshold test under § 307(c)(1) would in fact be satisfied by a finding of a single direct effect upon the coastal zone. Although the evidence of direct effects is substantial, such a showing is not required by the CZMA. It is manifest that a consistency review is required in this case.

III. NEPA

Plaintiffs also seek to enjoin the leasing of tracts in the northern portion of the Santa Maria Basin on the basis of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et. seq.* They allege that defendants have failed to comply with § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), which requires federal agencies to prepare and to circulate an environmental impact statement ("EIS") for major federal actions significantly affecting the quality of the human environment. Plaintiffs challenge the adequacy of the EIS prepared for Lease Sale No. 53 because the EIS failed to incorporate the most recent estimates of oil and gas reserves in the basin. Due to the alleged failure of the EIS to consider the newest data concerning the estimated hydrocarbon reserves, plaintiffs contend that a supplemental EIS is required by NEPA.

In September 1980, the final EIS on Lease Sale No. 53 was released by the Bureau of Land Management ("BLM"). The evaluation of environmental effects of Lease Sale No. 53 was based upon existing estimates of recoverable oil and gas resources, provided by the United States Geological Survey ("USGS"), Conservation Division, Los Angeles, California., At page xii of the EIS is an Addendum which presents the revised estimates of oil and gas resources for the five basins involved in Lease Sale No. 53, as of August 28, 1980. The expected recoverable resources were found to be "roughly twice the amount assumed in the draft and final EIS analyses". EIS at xii. The evaluations in the body of the EIS are based upon the original USGS estimates of

reserves, rather than on the more recent statistics. A Secretary Issue Document ("SID"), prepared in October 1980 for then Secretary Andrus did, however, incorporate the revised USGS estimates.

The central issue to be resolved is whether the EIS filed by the BLM concerning proposed Lease Sale No. 53 was adequate according to procedures set forth in the National Environmental Protection Act. In evaluating the procedural adequacy of the EIS, the Court is guided by the standard adopted by this circuit:

> [A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information. [Citation omitted]

Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981). The adequacy of the content of the EIS is determined by a rule of reason, which requires only "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences". *Id.*, quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). As the Ninth Circuit has cautioned, there is no *per se* rule requiring the inclusion of every potentially significant statistic. *See Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217 (9th Cir. 1979). Rather, "the test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences". *Columbia Basin Land Protection Association v. Schlesinger, supra* at 592, quoting *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (*per curiam*).

The sole procedural defect of which plaintiffs complain is the failure of defendants to incorporate the USGS revised estimates in the discussion of environmental effects in the EIS. At the outset, it must be noted that defendants did

not completely ignore the new estimates. The revised USGS estimates were clearly presented in an addendum at p. xii which preceded the main body of the EIS. Thus, it cannot be said that this information was not made available to the public.

Also, the EIS did point out the "high degree of uncertainty regarding the level of oil and gas reserves which might be present". EIS 1-12. The unrevised USGS estimate which predicts an initial yield of 400 million barrels for the Santa Maria Basin, is described as a "conditional probability". EIS 1-9, 1-11. Thus, the EIS does not disguise the fact that estimates of oil reserves, which form the basis of the predictions of a variety of environmental impacts, are "inherently speculative". EIS 1-13. Thus, this preliminary explanation of the reliability of estimates of hydrocarbon reserves serves as evidence of a "good faith attempt" to discuss foreseeable environmental consequences.

Perhaps, as plaintiffs suggest, detailed analysis of this new data, incorporated in the body of the EIS, would be more effective in informing the public of the potential risk posed to the environment. However, the format selected for the presentation of the information is left to the discretion of the federal agency. The Court's role is to ensure that the agency has taken a "hard look" at the environmental consequences, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and not to prescribe in detail the method by which the agency conveys this information to the public.

Assuming for the purpose of argument that the EIS was inadequate, according to the procedures set forth in NEPA, defendants argue that the SID has cured this alleged inadequacy. The SID, prepared a month after the EIS, presented the revised USGS figures and analyzed certain environmental impacts on the basis of the current estimates. SID at 1, 59. While the SID comments that the revised USGS estimates, which "indicate significantly higher resources for oil and gas", result in "higher environmental cost estimates", *Id.* at 1, it is not clear that the SID's limited analysis of the revised figures sufficiently clarifies the issues raised by the prediction doubling the estimated hydrocarbon reserves. Nevertheless, the Court need not

reach the question whether the SID alone would cure the alleged defect. Although the SID may not be sufficient in itself to remedy the omission of significant data, the document is likely to be helpful as a complement to the EIS by interpreting or clarifying issues raised in the EIS. *North Slope Borough v. Andrus*, Slip. Op. No. 80-1148, 15 E.R.C. 1633 (D.C. Cir. Oct. 9, 1980).

Under the facts of this case, the Department of Interior's actions in filing the EIS with an addendum presenting the newly revised estimates of hydrocarbon reserves, in addition to preparing an SID which analyzes certain impacts in light of the new data, comport with NEPA. Due to the high degree of uncertainty regarding the estimates of hydrocarbon reserves in the Santa Maria Basin, the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable. The Court concludes that "although the EIS could be 'improved by hindsight, it has satisfied the intent" of NEPA. *Cady v. Morton*, 527 F.2d 786, 797 (9th Cir. 1975), quoting *National Forest Preservation Group v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973).

IV. SECTION 19 OF THE OUTER CONTINENTAL SHELF LANDS ACT

A third claim for injunctive and declaratory relief is premised on the Secretary's alleged violation of § 19 of the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1345. Section 19 provides that the governor of an affected state may submit recommendations to the Secretary regarding the size, time or location of the proposed lease sale, 43 U.S.C. § 1345(a), and that the Secretary is required to accept the governor's recommendations "if he determines ... that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Plaintiffs contend that the Secretary's decision to reject Governor Brown's recommendation to delete the tracts in dispute from Lease Sale No. 53 fails to comply with § 19. According to plaintiffs, since the Governor's recommendation provided for a "rea-

sonable balance" as required by § 19, the Secretary was obligated to accept the recommendation.

In deciding whether the Secretary's decision to proceed with Lease Sale No. 53 complies with § 19 of OCSLA, the scope of the court's inquiry is limited by the deferential standard of review applicable to this determination. *See, e.g., Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1 (D.C. Cir. 1976). The statute itself provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious". 43 U.S.C. § 1345(d). In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), quoted in *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296 (9th Cir. 1980). The Court may not substitute its judgment for that of the agency.

In the present case, the record shows that the Secretary did undertake an examination of the balance between the interests at stake in Lease Sale No. 53. In a letter subsequently mailed to the Governor, the Secretary described the mode of analysis employed in the Secretary's balancing process. Defendants' Ex. L-P (letter from Secretary Watt of Governor Brown, dated May 1, 1981). This explanation indicates that the Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills. Factors which, in the Secretary's view, were "not quantifiable", including damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses", were given only cursory consideration. A thorough evaluation of all relevant factors through more sophisticated analytical techniques would certainly have been desirable, but within wide limits, the final decision as to the type of analysis which is appropriate in view of the available data must be the agency's, subject to review only for obvious errors of methodology. *Massa-*

chusetts v. Andrus, 594 F.2d 872, 886 (1st Cir. 1979). Under the applicable standard of review, the Court cannot conclude that there has been a clear error of judgment.

The Secretary's mode of analysis must also be considered in light of the fact that OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. In deciding whether to accept or reject the Governor's recommendation, the Secretary must determine whether it provides for a "reasonable balance" of two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). Section 19 requires that the determination of the "national interest" be based on "the desirability of obtaining oil and gas supplies in a balanced manner", but provides no basis for evaluating the citizens' well-being. *Id.*

Nevertheless, the fact that the statute fails to provide explicit guidance will not excuse the absence of reasoned analysis of all considerations specified within the Act. The Court has a responsibility to scrutinize an agency's judgment as to the proper balance to be struck between conflicting interests. *NLRB v. Brown*, 380 U.S. 278 (1965). Here, the Secretary's extremely limited consideration of one of two potentially conflicting interests, the "well-being of the citizens of the affected State", barely suffices to meet the plaintiffs' challenge.

Plaintiffs also point to purported procedural flaws in the Secretary's determination pursuant to § 19. First, plaintiffs complain of a lack of opportunity for consultation. The statute imposes the responsibility on the Secretary for the provision of such an opportunity. 43 U.S.C. § 1345(c). However, the timing of the opportunity and the mode of making consultation available is within the Secretary's discretion. The record indicates the existence of limited formal correspondence between the parties, including Governor Brown's letter of December 24, 1980, and Secretary Watt's letter of February 10, 1981. Although minimal communication in writing is not conducive to meaningful consultation between the Secretary and the Governor, it nevertheless meets the bare technical requirements of the statute. In sum, there is an insufficient basis for the conclusion that

the Secretary arbitrarily and capriciously deprived the Governor of further opportunities for consultation.

A second alleged procedural flaw relates to the requirement that the Secretary communicate to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c). The Secretary's letter to Governor Brown, dated May 1, satisfies this requirement. The statute does not require that the written explanation be provided prior to the Secretary's announcement of his decision to proceed with the lease sale. Although the provision of a timely explanation is likely to be more effective in implementing the statutory policy if insuring governors of affected states a "leading role in OCS decisions",[20] H. Conf. Rep. 95-1474, 95th Cong., 2d Sess. 106, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1674; H.R. Rep. 95-590, 95th Cong, 2d Sess. 152, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1558, the Court cannot substitute its judgment for that of Congress by imposing a requirement concerning the timing of the explanation.

There is one further aspect of the timing of the explanation which requires comment. Because the Secretary's reasons for his decision were committed to writing 21 days after the announcement of the decision and 2 days after this suit was filed alleging a failure to provide an adequate rationale for the rejection of the Governor's recommendation, the Secretary's explanation is subject to the inherent danger of "*post hoc* rationalization". *See Overton Park v. Volpe, supra*, at 419-20; *American Petroleum Institute v. Knecht, supra*, at 908-9. An explanation which takes on the aspect of a litigation affidavit must, of course, be viewed critically. *Id.* However, the danger presented by *post hoc* explanations may be less where, as here, the announced agency decision was accompanied by a contemporaneous ex-

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[20] Section 19 is "intended to insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to lease sales and development and production plans. In addition, it is intended to provide a mechanism for involvement of Governors and local government officials". H. Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1558.

planation of some of the considerations that formed a basis of the decision,[21] and where the administrative record lends some support to the explanation. *See Camp v. Pitts*, 411 U.S. 138 (1973) (*per curiam*). That is the best that can be said for the Secretary's timing.

Taking into consideration all of the foregoing factors, the Court must conclude that the Secretary has complied, although minimally, with the necessary procedural requirements under § 19 of OCSLA. 43 U.S.C. § 1345. Although the Secretary quite clearly violated the spirit of the Act, giving due deference to his judgment, it cannot be said that his determination to reject the recommendation submitted by Governor Brown was legally "arbitrary and capricious".

V. ENDANGERED SPECIES ACT

As a fourth ground of relief, plaintiffs allege that defendants have violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, which directs federal agencies "to conserve endangered and threatened species". 16 U.S.C. § 1531(c). Section 7(a) of the Act requires each federal agency to "insure" that an action by that agency "does not jeopardize the existence of any endangered species or threatened species . . . ." 16 U.S.C. § 1536(a)(2). In order to facilitate compliance with this requirement, the Act imposes on the Secretary and any agency whose actions may affect an endangered or threatened species the duty of

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[21] On April 10, 1981 at 10:00 a.m., the Department of Interior issued a news release, discussing generally the accelerated five-year offshore leasing plan proposed by the Department of Interior. Included in the New Release is a brief discussion of Lease Sale No. 53, in which some of the interests "balanced" by the Secretary are noted.

Defendants have questioned the propriety of considering information contained in documents which do not form a part of the administrative record. The Ninth Circuit has concluded that where the court finds it necessary to go outside the administrative record, it may consider such evidence "to ascertain whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision". *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980). Under this analysis, it is proper to consider the press release in evaluating the danger of *post hoc* rationalization in the Secretary's course of action, described *supra*.

"consultation".[22] Section 7(c)(1), 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.04 (1980). Section 7(c)(1) provides:

> To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall ... request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.

In fulfilling the consultation requirement of Section 7(c), the agency is required to "use the best scientific ... data available". *Id.*

During April of 1980, the BLM requested biological opinions from the two federal agencies with jurisdiction over the marine animals which it had determined were likely to be affected by the proposed lease sale. In response to this request, the National Marine and Fisheries Service ("NMFS") prepared a biological opinion on the impact of the lease sale on various species of whales and sea turtles, and the Fish and Wildlife Service ("FWS") prepared a biological opinion on the impact of the lease sale on the southern sea otter and other species of wildlife. Ex. L-5 (FWS Opinion), Ex. L-6 (NMFS Opinion). Both opinions concluded that the proposed lease sale and exploration activities associated with Lease Sale No. 53 were not likely to jeopardize any endangered or threatened species. *Id.*

Plaintiffs challenge the adequacy of the two biological opinions. First, plaintiffs claim that, in failing to reappraise the risks posed by leasing activities and exploratory drilling in light of the revised USGS resource estimates, defendants have not employed "the best scientific data available".

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[22] The implementing regulations under § 7 of ESA provide for formal consultation with one or both of two agencies which share responsibilities under the ESA; these agencies are the United States Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). 50 C.F.R. §§ 402.01, 402.04.

Secondly, according to plaintiffs, biological opinions which fail to evaluate the risks at the development and production stages cannot provide an adequate basis for a finding of no jeopardy.

The short answer to plaintiffs' expressed concern that defendants did not utilize the newest information as to the revised oil reserve estimates is simply that the agencies which prepared the biological opinions did evaluate the risks posed to endangered or threatened species in light of that data. The FWS opinion discussed the significance of the revised USGS resource estimates in its analysis of the cumulative effects upon sea otters as the result of an oil spill, and explicitly stated that its findings were based on "the new oilspill analysis data of August 28, 1980". Ex. L-5 at 9-11. The NMFS opinion was drafted before the NMFS became aware of the revised estimates of hydrocarbon potential. However, upon consideration of the revised estimates, the NMFS concluded that there was "no increased risk to marine mammals and endangered species" during the leasing and exploration stages and, therefore, no modification of the biological opinion prepared for Lease Sale No. 53 was required. Declaration of James H. Lecky.[23]

Any question as to the extent of the consideration given the revised resource estimates is beyond the proper scope of review. *See, e.g., Citizens to Preserve Overton Park v. Volpe, supra.*, at 146. Since there is evidence of consideration of the new USGS data, the Court must conclude that the consultation was based upon the "best scientific information available" as required by § 7 of ESA.

The potential risks that may be incurred during the development and production phases were not ignored during the consultation process. In fact, the FWS opinion acknowledges that potential development/production-related facilities could have an effect on endangered and threatened species. Ex. L-5 at 3. Since the specific location, nature, and size of facilities that might be necessary during these pha-

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[23] James H. Lesky, as Marine Mammal and Endangered Species Coordinator for the Southwest Region, NMFS, was responsible for the preparation of the biological opinion which NMFS submitted to BLM on September 17, 1980.

ses is not yet known, the potential jeopardy to the endangered species posed by the subsequent phases of OCS development was not determined. *Id.*; Ex. L-6 at 4. Both opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. *Id.* In light of the restrictions imposed on the FWS and the NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to develop and production cannot be held unreasonable. *See North Slope v. Andrus, supra*, at 37-42, and *Conservation Law Foundation v. Andrus*, 14 [BNA] E.R.C. 1049, 1050-51 and nn. 2-3 (1st Cir. Dec. 17, 1979); *but see Hill v. TVA*, 549 F.2d 1064, 1070-72 (6th Cir. 1977), *aff'd* 437 U.S. 153 (1978).

Plaintiffs allege a violation of another section of the ESA, § 7(d), which provides that a federal agency "shall make no irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any resonable and prudent alternative measures" which would avoid jeopardizing the existence of any endangered or threatened species. 16 U.S.C. § 1536(d). Plaintiffs have not demonstrated that such an irreversible or irretrievable commitment of resources has occurred as a result of the activities thus far approved during § 7 consultation. Although not yet addressed by the Ninth Circuit, two other circuits have rejected similar arguments to the effect that an OCS sale constitutes an "irreversible or irretrievable commitment of resources" within the meaning of § 7(d). *North Slope v. Andrus, supra; Conservation Law Foundation v. Andrus, supra.*

VI. "TAKING" UNDER § 9 OF THE ENDANGERED SPECIES ACT AND UNDER THE MARINE MAMMAL PROTECTION ACT

Plaintiffs' final claim arises under § 9 of the ESA, 16 U.S.C. § 1538, and under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.* They argue that a "taking" under § 9 of ESA and under the MMPA will result from the leasing of tracts in the northern Santa Maria Ba-

sin. The defendants' activities relating to Lease Sale No. 53 are not encompassed by the prohibitions of either § 9 of ESA or the MMPA.

The language of the statutes provides no support for plaintiffs' arguments. The statutes forbid any person to "take" any marine mammal or endangered species of fish or wildlife from waters within the jurisdiction of the United States. 16 U.S.C. § 1372(a)(1); 16 U.S.C. § 1538(a)(1). Assuming *arguendo* that the proposed leasing activities do constitute a threat to the continued survival of species protected by these statutes, such a threat would still not constitute a "taking" under the statutes. ESA defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19). Thus, in prohibiting "taking", the draftsmen of the statutes envisioned a more immediate injury. *Cf. Palila v. Hawaii Dept. of Land & Natural Resources* 471 F. Supp. 985 (D. Hawaii 1979). A review of the record reveals no clear showing of such harm, attempted harm, or harassment[24] as is required by the statutes. Plaintiffs have not demonstrated that defendants' activities relating to Lease Sale No. 53 are encompassed by § 9 of ESA or by the MMPA.

VII. THE PROPER SCOPE OF ANALYSIS UNDER ESA, THE MMPA AND THE CZMA

A question common to three of the statutes relied upon by plaintiffs—ESA, the MMPA and the CAMA—is whether the Court should focus on a discrete stage of a multistage OCS project designed to exploit and develop the mineral resources of the OCS or whether the court should examine the project as a continuum of planned events. That is, in analyzing plaintiffs' claims under the different environmental statutes, should the Court look at Lease Sale No. 53 merely as the first discrete link in the chain or

[24] The regulations of the Fish and Wildlife Service further define "harass" as "an intentional or negligent act or omission ... annoying wildlife to such an extent as to significantly disrupt normal behavior patterns...." 50 C.F.R. § 17.3. There is no evidence in the record to support such a finding of harassment.

should the Court consider the lease sale by reference to the complete chain of events which it initiates? The answer to this question cannot be the same for all of the statutes involved here. To determine the proper scope of analysis, the Court must look to the policy behind the statute.

The CZMA, as discussed *supra*, is intended to further the development and implementation of comprehensive management programs for the coastal area. The needs of present and future generations are to be considered during the planning process envisioned by Congress. Under the CZMA, a myopic view of an isolated phase of a multistage project would be inappropriate. The decision-makers must integrate the full panoply of possibilities into a comprehensive plan. Thus, the states and the federal agencies must consider long-term effects as well as immediate effects in order to manage the coastal zone effectively. It would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not "pumping oil". *See North Slope Borough v. Andrus*, *supra*, at 40. The CZMA requires an evaluation of the consequences of the lease sale as well as the resulting activities occurring as a result of the notice of sale.

In contrast, ESA and the MMPA have a narrower focus. ESA, like the CZMA, is intended to serve the goal of preservation of fragile environmental resources. In the case of ESA, the protected resource is the species threatened with extinction, whereas, under the CZMA, all coastal resources are to be protected to accomplish the goal of preservation. ESA relies on different means from those of the CZMA. ESA does not focus on comprehensive planning. Instead, it prescribes safeguards, such as specific prohibitions on particular acts, such as killing or wounding an endangered species of fish or wildlife. *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). Under ESA, the Secretary is required to make individual determinations as events arise concerning the risk posed to a threatened or endangered species by a particular action. It may not be feasible to prescribe the proper safeguards until the discrete stage is at hand. Thus, a more limited focus is appropriate under ESA. The same distinction applies to the MMPA as opposed to the CZMA.

The MMPA prescribes specific safeguards in order to prevent imminent harm or harassment of marine mammals; it provides restrictions on the "taking" and importing of certain species of marine mammals, and provides for enforcement of the restrictions. 16 U.S.C. §§ 1371-1377. A focus on a discrete stage of activity is also appropriate to effectuate the purpose of the MMPA just as it is with respect to the ESA. In sum, in this case, an examination of the threat posed by specific activities at the time the immediate threat is posed will carry out the objectives of the MMPA and ESA.

CONCLUSION

Plaintiffs are entitled to injunctive and declaratory relief on their claims under the CZMA. As to the remaining claims raised in the Complaint, defendants are entitled to judgment as a matter of law.

The Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

/S/ MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

DATED: AUGUST 18, 1981

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 81-2080 MRP

STATE OF CALIFORNIA, ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS

CASE NO. CV 81-2081 MRP

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PLAINTIFFS,

v.

JAMES G. WATT, ET AL., DEFENDANTS.

Filed Aug. 18 1981

ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed. R. Civ. P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6) came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendent-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6)is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-

intervenors, County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed. R. Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order.

DATED: August 18, 1981

/s/ MARIANA R. PFAELZER

MARIANA R. PFAELZER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700, 81-5701, 81-5811, 81-5812, 81-5813, 81-5814, 81-5815, 81-5720, 81-5822

DC CV 81-2080 81-2081 MRP

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., ET AL.,
PLAINTIFFS-APPELLEES,

v.

JAMES G. WATT, AS SECRETARY OF THE INTERIOR, ET AL.,
DEFENDANTS,

WESTERN OIL AND GAS ASSOCIATION,
A REGIONAL TRADE ASSOCIATION, ET AL.,
DEFENDANTS-IN-INTERVENTION/APPELLANTS.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part, vacated in part, and stayed in part.

Filed and entered: August 12, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700, 81-5701, 81-5720, 81-5811, 81-5812, 81-5813, 81-5814, 81-5815, 81-5822

STATE OF CALIFORNIA, ET AL.,
APPELLEES/CROSS-APPELLANTS,

v.

JAMES G. WATT, ET AL., APPELLANTS/CROSS-APPELLEES.

Filed Nov 10 1982

ORDER

Before: SNEED, TANG, and PREGERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestions. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX E

Section 307 of the Coastal Zone Management Act, 16 U.S.C. (& Supp. V) 1456, provides in pertinent part:

(a) Federal agencies. In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies. The Secretary shall not approve the management program submitted by a state pursuant to section 306 [16 USCS § 1455] unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activites with state management programs; certification. (1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the

earliest practicable time, the state of its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 306 [16 USCS §1455], any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be estab-

lished by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, of if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

* * * * *

The Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. IV) 1331 *et seq.*, provides in pertinent part:

Section 8(a), 43 U.S.C. (Supp. IV) 13337(a):

> (1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title.
>
> * * * * *

Section 11, 43 U.S.C. (Supp. IV) 1340:

> (a) Approved exploration plans. (1) Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area.
>
> (2) The provisions of paragraph (1) of this subsection shall not apply to any person conducting explorations pursuant to an approved exploration plan on any area under lease to such person pursuant to the provisions of this Act.
>
> (b) Oil and gas exploration. Except as provided in subsection (f) of this section, beginning ninety days after the date of enactment of this subsection [enacted Sept. 18, 1978], no exploration pursuant to any oil and gas lease issued or maintained under this Act may be undertaken by the holder of such lease, except in accordance with the provisions of this section.
>
> (c) Plan approval; State concurrence; plan provisions. (1) Except as otherwise provided in the Act, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this Act, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and

shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this Act, regulations prescribed under this Act, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) of this Act [43 USCS § 1334(a)(8)], and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 5(a)(2)(A)(i) of this Act [43 USCS § 1334(a)(2)(A)(i)], and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under the preceding sentence, he may, subject to section 5(a)(2)(B) of this Act [43 USCS § 1334(a)(2)(B)], cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 5(a)(2)(C)(i) or (ii) of this Act [43 USCS § 1334(a)(2)C)(i) or (ii)].

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455], unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 USCS § 1456(c)(3)(B)(i) or (ii)], or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(B)(iii)].

(3) An exploration plan submitted under this subsection shall include, in the degree of detail which the Secretary may by regulation require—

(A) A schedule of anticipated exploration activities to be undertaken [undertaken]; (GR)(B) a description of equipment to be used for such activities;

(C) the general location of each well to be drilled; and

(D) such other information deemed pertinent by the Secretary.

(4) The Secretary may, by regulation, require that such plan be accompanied by a general statement of development and production intentions which shall be for planning purposes only and which shall not be binding on any party.

(d) Drilling permit. The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.

(e) Plan revisions; conduct of exploration activities. (1) If a significant revision of an exploration plan approved under this subsection is submitted to the Secretary, the process to be used for the approval of such revision shall be the same as set forth in subsection (c) of this section.

(2) All exploration activities pursuant to any lease shall be conducted in accordance with an approved exploration plan or an approved revision of such plan.

(f) Drilling permits issued and exploration plans approved within 90-day period after September 18, 1978. (1) Exploration activities pursuant to any lease for which a drilling permit has been issued or for which an exploration plan has been approved, prior to ninety days after the date of enactment of this subsection [enacted Sept. 18, 1978], shall be considered in compliance with this section, except that the Secretary may, in accordance with section 5(a)(1)(B) [43 USCS § 1334(a)(1)(B)] of this Act, order a suspension or temporary prohibition of any exploration activities and require a revised exploration plan.

(2) The Secretary may require the holder of a lease described in paragraph (1) of this subsection to supply a general statement in accordance with subsection (c)(4) of this section, or to submit other information.

(3) Nothing in this subsection shall be construed to amend the terms of any permit or plan to which this subsection applies.

(g) Determinations requisite to issuance of permits. Any permit for geological explorations authorized by this section shall be issued only if the Secretary determines, in accordance with regulations issued by the Secretary, that—

(1) The applicant for such permit is qualified;

(2) the exploration will not interfere with or endanger operations under any lease issued or maintained pursuant to this Act; and

(3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

* * * * *

Section 19, 43 U.S.C. (Supp. IV) 1345:

(a) Recommendations regarding size, time, or location of proposed lease sales. Any Governor of any affected States or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan. Prior to submitting recommendations to the Secretary, the executive of any affected local government in any affected State must forward his recommendations to the Governor of such State.

(b) Time for submission of recommendations. Such recommendations shall be submitted within sixty days after notice of such proposed lease sale or after receipt of such development and production plan.

(c) Acceptance or rejection of recommendations. The Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. For purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and

policies of this Act. The Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations, or to implement any alternative means identified in consultation with the Governor to provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

(d) Finality of acceptance or rejection of recommendations. The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 23 of this Act [43 USCS § 1349], unless found to be arbitrary or capricious.

(e) Cooperative agreements. The Secretary is authorized to enter into cooperative agreements with affected States for purposes which are consistent with this Act and other applicable Federal law. Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 26 of this Act [43 USCS § 1352]), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore.

Section 25, 43 U.S.C. (Supp. IV) 1351:

(a) Development and production plans; submission to Secretary, statement of facilities and operation; submission to Governors of affected States and local governments. (1) Prior to development and production pursuant to an oil and gas lease issued after the date of enactment of this section [enacted Sept 18, 1978] in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to such date of enactment in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying

quantities prior to such date of enactment [enacted Sept. 18, 1978], the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, for approval pursuant to this section.

(2) A plan shall be accompanied by a statement describing all facilities and operations, other than those on the outer Continental Shelf, proposed by the lessee and known by him (whether or not owned or operated by such lessee) which will be constructed or utilized in the development and production of oil or gas from the lease area, including the location and site of such facilities and operations, the land, labor, material, and energy requirements associated with such facilities and operations, and all environmental and safety safeguards to be implemented.

(3) Except for any privileged or proprietary information (as such term is defined in regulations issued by the Secretary), the Secretary, within ten days after receipt of a plan and statement, shall (A) submit such plan and statement to the Governor of any affected State, and, upon request, to the executive of any affected local government, and (B) make such plan and statement available to any appropriate interstate regional entity and the public.

(b) Development and production activities in accordance with plan as lease requirement. After the date of enactment of this section [enacted Sept. 18, 1978], no oil and gas lease may be issued pursuant to this Act in any region of the outer Continental shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan which complies with the requirements of this section.

(c) Scope and contents of plan. A plan may apply to more than one oil and gas lease, and shall set forth, in the degree of detail established by regulations issued by the Secretary—

(1) The specific work to be performed;

(2) a description of all facilities and operations located on the outer Continental Shelf which are proposed by the lessee or known by him (whether or not owned or operated by such lessee) to be directly re-

lated to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations;

(3) the environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented;

(4) all safety standards to be met and how such standards are to be met;

(5) an expected rate of development and production and a time schedule for performance; and

(6) such other relevant information as the Secretary may by regulation require.

(d) State occurrence in land or water zone use in coastal zone of state. The Secretary shall not grant any license or permit for any activity described in detail in a plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455], unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(B) (i) or (ii) [16 USCS § 1456(c)(3)(B) (i) or (ii)] of such Act, or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(B)(iii)].

(e) Declaration of approval of development and production plan as major Federal action; submission of preliminary or final lease plans prior to commencement of National Environmental Policy provisions procedures.

(1) At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.

(2) The Secretary may require lessees of tracts for which development and production plans have not been approved, to submit preliminary or final plans for their leases, prior to or immediately after a determination by the Secretary that the procedures under the National Environmental Policy Act of 1969 shall commence.

(f) Plans considered major Federal actions; submission of draft environmental impact statement to Governors of affected States and local governments. If approval of a development and production plan is found to be a major Federal action, the Secretary shall transmit the draft environmental impact statement to the Governor of any affected State, and upon request, to the executive of any local government, and shall make such draft available to any appropriate interstate regional entity and the public.

(g) Plans considered nonmajor Federal actions; comments and recommendations from States. If approval of a development and production plan is not found to a major Federal action, the Governor of any affected State and the executive of any affected local government shall have sixty days from the date of receipt of the plan from the Secretary to submit comments and recommendations. Prior to submitting recommendations to the Secretary, the executive of any affected local government must forward his recommendations to the Governor of his State. Such comments and recommendations shall be made available to the public upon request. In addition, any interested person may submit comments and recommendations.

(h) Approval, disapproval of modification of plan; reapplication; periodic review. (1) After reviewing the record of any public hearing held with respect to the approval of a plan pursuant to the National Environmental Policy Act of 1969 or the comments and recommendations submitted under subsection (g) of this section, the Secretary shall, within sixty days after the release of the final environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 in accordance with subsection (e) of this section, or sixty days after the period provided for comment under subsection (g) of this section, approve, disapprove, or require modifications of the plan. The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment, including compliance with the regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) [43 USCS § 1334(a)(8)] of

this Act. Any modifiction required by the Secretary which involves activities for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455] must receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) [16 USCS § 1456(c)(3)(B)(i) or (ii)] of such Act unless the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) [16 USCS § 1456(c)(3)(B)(iii)] of such Act. The Secretary shall disapprove a plan—

(A) if the lessee fails to demonstrate that he can comply with the requirements of this Act or other applicable Federal law, including the regulations prescribed by the Secretary pursuant to paragraph (8) of section 5(a) [43 USCS § 1334(a)(8)] of this Act [43 USCS § 1334(a)(8)];

(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) [16 USCS § 1455] do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 USCS § 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 USCS § 1456(c)(3)(b)(iii)];

(C) if operations threaten national security or national defense; or

(D) if the Secretary determines, because of exceptional geological conditions in the lease areas, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other acquatic life), to property, to any mineral deposits (in areas leased or not leased), to

the national security or defense, or to the marine, coastal or human environments, (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production.

(2)(A) If a plan is disapproved—

(i) under subparagraph (A) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455),

the lessee shall not be entitled to compensation because of such disapproval.

(B) If a plan is disapproved—

(i) under subparagraph (C) or (D) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued before approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972, and such approval occurs after the lessee has submitted a plan to the Secretary,

the term of the lease shall be duly extended, and at any time within five years after such disapproval, the lessee may reapply for approval of the same or a modified plan, and the Secretary shall approve, disapprove, or require modifications of such plan in accordance with this subsection.

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 5(a)(2)(C) of this Act [43 USCS § 1334(a)(2)(C)]. The Secretary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required

plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 5(c) of this Act [43 USCS § 1334(c)].

(3) The Secretary shall, from time to time, review each plan approved under this section. Such review shall be based upon changes in available information and other onshore or offshore conditions affecting or impacted by development and production pursuant to such plan. If the review indicates that the plan should be revised to meet the requirements of this subsection, the Secretary shall require such revision.

(i) Approval of revision of approved plan. The Secretary may approve any revision of an approved plan proposed by the lessee if he determines that such revision will lead to greater recovery of oil and natural gas, improve the efficiency, safety, and environmental protection of the recovery operation, is the only means available to avoid substantial economic hardship to the lessee, or is otherwise not inconsistent with the provisions of this Act, to the extent such revision is consistent with protection of the human, marine, and coastal environments. Any revision of an approved plan which the Secretary determines is significant shall be reviewed in accordance with subsections (d) through (f) of this section.

(j) Cancellation of lease on failure to submit plan or comply with approved plan. Whenever the owner of any lease fails to submit a plan in accordance with regulations issued under this section, or fails to comply with an approved plan, the lease may be canceled in accordance with sections (c) and (d) [43 USCS § 1334(c) and (d)]. Termination of a lease failure to comply with an approved plan, including required or revisions, shall not entitle a lessee to any compensation.

* * * * *

Section 102, 43 U.S.C. (Supp. IV) 1802:

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;
(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;
(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;
(4) provide States, and through States, local governments, which are impacted by Outer Continetal Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;
(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;
(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;
(7) minimize or eliminate conflicts between the exploration, development, and production of oil and

natural gas, and the recovery of other resources such as fish and shellfish;

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Nos. 82-1326, 82-1327 and 82-1511

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, ET AL., PETITIONERS,

v.

STATE OF CALIFORNIA

WESTERN OIL AND GAS ASSOCIATION, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

STATE OF CALIFORNIA, ET AL., CROSS-PETITIONER

v.

JAMES G. WATT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

(Counsel of Record Appear on Inner Cover)

PETITIONS FOR CERTIORARI FILED BY JAMES G. WATT, ET AL., AND WESTERN OIL AND GAS ASSOCIATION, ET AL., FILED ON FEBRUARY 8, 1983

CROSS-PETITION BY THE STATE OF CALIFORNIA, ET AL., FILED ON MARCH 11, 1983

CERTIORARI GRANTED MAY 16, 1983

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RELEVANT DOCKET ENTRY

PLAINTIFFS

THE STATE OF CALIFORNIA, Acting by and through GOVERNOR EDMUND G. BROWN, JR., THE CALIFORNIA COASTAL COMMISSION, THE CALIFORNIA RESOURCES AGENCY, THE CALIFORNIA DEPARTMENT OF FISH AND GAME, THE CALIFORNIA DEPARTMENT OF CONSERVATION,

DEFENDANTS

JAMES G. WATT as Secretary of the Interior; THE UNITED STATES DEPARTMENT OF INTERIOR; EDWARD HASTEY as Acting Director of the United States Bureau of Land Management; ROBERT BUFORD as Director Designate of the United States Bureau of Land Management in his official capacity as Director when and if assumed; and the UNITED STATES BUREAU OF LAND MANAGEMENT

DATE	NR.	PROCEEDINGS
4/29/81	nm	1. Fld complt. Issd summs. Case may be ref to Mag McMahon for Discovery.
5/1/81	dv	2. Fld pltfs' notc of motn & motn for prelim inj; memo of P&A in suppt; & declar retbl 6/1/81 at 10 AM
	sb	3. Fld pltf's notc of of lodging varios docs
		4. Fld Federal deft's ex parte applic with declar, for set of schedule for briefing & hrg on pltf motn for prelim inj
		5. Fld deft's declar of James R. Arnold
		6. Fld pltf's ex parte applic for oed shortening ti & cal on other than motn day & declar & memo of P/A in suppt thereof
5/7/81	dv	7. Fld stip & ORD(MRP) consolidatng cases 81-2080 & 81-2081, under CV81-2080
		8. Fld ex parte applic for Ord shortening ti
5/12/81	sb	9. Fld memo in suppt of motn to interve as deft
		10. Fld Ord graning ex parte applic ord shortening ti

11. Fld notc of motn for lv to intervene as deft reble 5-22-81 10am
12. Fld motn for lv to interverne as deft
13. Fld Ord pltf's motn for prelim inj be heard on 5-22-81 10am
14. Fld plftf's consent of cnsl for designation pur local rule 1.3
15. Fld deft's memo in resp to pltf motn for prelim inj
16. Fld aff in suppt of motn to interverne
17. Fld notc of Ord granting ex parte applic for rd shortening ti b applic for intervention
18. Fld opp of applic for interve to pltf's motn for prelim inj

5/13/81 dv

19. Fld defts' notc of lodgng docs
20. Fld notc of Francis X. Bellotti, AG of Massachusetts, to fil a brief as Amicus Curiae
21. Fld applic for lv to appear Pro Hac Vice on behf of Francis X. Bellotti
22. Fld pltfs in inerventn Local Govts' notc of motn for prelim inj, retbl 5/22/ 10 am
23. Fld pltfs in interventn Local Govts' motn for prelim inj
24. Fld pltfs in interventn Local Govts' memo of P&A in suppt of motn
25. Fld Local Govts' motn to intervene as ptys pltf, retbl 5/22/81, 10 am
26. Fld Local Govts' notc of motn to intervene
27. Fld Local Govts' memo in suppt of motn to intervene
28. Fld Local Govts' applic & memo for ord shrtning tim, aff of Irwin Karp in sup & ORD (MRP) shortng tim is shortnd such that the service which has already be made of th docs as std in the Cert of Svc attched to the Notc of Motn to Intervene is sufficient svc on the ptys. Fur ORD that each pty to actn is to notified by phone nlt noon on 5/14/81 of this ord.

29. Fld Ex parte applic by St of Alaska for leav to fil Amicus Curiae Brief
30. Fld ORD(MRP) GRANTING leav for St of Alaska to fil Amicus Curiae Brief
31. Fld St of Alaska's applic & ORD(MRP) allowing Lauri J. Adams to appear as nonresident atty design Theodora Berger or John Saurenman as local cnsl.
32. Fld St of Alaska's notc & Amicus Curiae Brief on pltf's motn for prelim inj
33. Fld St of Alaska's aff of svc of various docs re Amicus Curiae re prelim inj

5/14/81 dv

34. Fld applic of Coastal States Organization to fil brief as amicus curiae
35. Fld ORD(MRP) GRANTING Coastal States Organizatn leav to fil brief as amicus curiae
36. Fld amicus curiae brief of Coastal States Organizatn in suppt of pltfs' motn prelim inj
37. Fld fed defts' declar of James Lecky

5/15/81 dv

38. Fld fed defts' 2nd notc of lodgng
39. Fld fed defts' exh L-U, L-Y, L-EE, & L-FF
40. Fld applic St of Maine's requst to appear as Amicus Curiae
41. Fld applic St of Maine's applic & ORD(MRP) allwng Elzabeth Butler to appear as non-resdnt atty design John Saurenman as local cnsl
42. Fld pltf St of Calif closng memo in suppt of motn for Prelim Inj
43. Fld pltfs' notc of lodgng docs
44. Fld pltfs errata sheet
45. Fld memo of amicus curiae Francis Bellotti in suppt of motn for prelim inj concurring stmt of the St of Maine
46. Fld pltfs' reply brief in suppt of motn for prelim inj

5/15/81	dv	47.	Fld St of Oregon's motn for amicus Curiae status
		48.	Fld St of Oregon's aff supptg motn for ord grntg Amicus Curiae status
		49.	Fld ORD(MRP) GRANTING St of Oregon Amicus Curiae status
		50.	Fld applic St. of Oregon's motn for pro hac vice
		51.	Fld ORD(MRP) GRANTING pro hac vice for State of Oregon, allowing Mary Deits, Ast AG for St of Oregon, to appear before this crt.
		52.	Fld St of Oregon's designatn of local cnsl, desig George Deukmejian, AG, & Theodora Berger, Dep AG.
		53.	Fld ORD(MRP) design AG George Deukmejian & Dep AG Theodora Berger & John Surenman as local cnsl for St of Oregon
5/18/81	dv	54.	fld Local Govts' reply memo of Fed defts' & to applicnts-for-interventns' oppos to motn for prelim inj
5/20/81	dv	55.	Fld Co. of San Diego's motn for leav to intervene as a pty pltf, retbl 6/15/81 at 10 am
		56.	Fld Co of San Diego's notc of motn
		57.	Fld Co of San Diego's memo of P&A in suppt ot motn
		58.	Fld Co of San Diego's dec of svc by mail of motn & related docs LODGED Co of San Diego's prop review of Administrativ Actn & Complant in Intervn for declaratory & Injunctv Relief & Mandamus
*5/19/81	dv	59.	Fld resp of California pltfs to Westrn Oil & Gas Assoc's opposn to prelim inj motns
*5/19/81	dv	60.	Fld applic & ORD(MRP) allowng E. Edward Bruce to appear as non-resident at desig Howard Privett as locl cnsl, on bhf of Western Oil & Gas Assn.

*5/19/81	dv	61. Fld applic & ORD(MRP) allowng Constance Chatwood to appear as non-resid at desig Howard Privett as locl cnsl, on bhf of Western Oil & Gas Assn.
*5/19/81	dv	62. Fld proof of svc of S&C, svd on Robert Burford by svg Carole Purcell on 5/4/81; US Bureau of Land Mgmnt by svg Ed Hastey, Actng Dir.; Edward Hastey Actng Dir of BLM; James Watt, Secy of Interior by svg Carol Kesterson; US Dept of the Interior by svg Carol Kesterson, Chief, Docket Rcrds; on 5/5/
5/20/81	dv	63. Fld stip re presence of affiants
		64. Fld Natural Resources Defns Council's reply to opposn of Westrn Oil & Gas et al. to pltfs' motns for prelim inj
		65. Fld NRDC's respns to Western Oil & Gas Assn's motn to intervene
5/22/81	ag	66. Fld applicnts ansr for intervntn to pltf Cal complt for declatry and inj relief and mandms
5/22/81	ag	67. Fld pltfs' exh subm on oil compnys positn regrdng the possib impossiblty of"undoing" a lease sale
5/22/81	dv	68. Fld ORD(MRP) allowng Western Oil & Gas Assoc et al lev to intervene as defts
		69. Fld ORD(MRP) GRANTING motn of local govts to intervene as pltfs
		70. Fld complant of pltfs in interventn seekng review of an administrativ decision, declaratory & injunctiv relief, & mandamus
		71. Fld proof of svc of pltfs' notc of motn & motn for prelim inj, P&A, on James Arnold by mail on 5/4/81
		72. MIN ORD: Crt GRNTS motns to interven & GRANTS Amicus Curiae briefs. ORD matrs contd to 5/27/81 at 9 am.

5/28/81	yd	73.	Fld Prelim Injunctn that motns of pltfs in interventn are GRANTED & Fed defts, etc. are restrained & enjoined fr acceptng or rejectng any bids, issuing any leases or tkng any other actn in connectn w/OCS Lease Sale 53, Santa Maria Basin, for trac #129 thru 142, 144 thru 146, 148 thru 155 & 158 thru 164 exc for receiving & opening of bids & conducting internal admin review of all bids. Fur ORD that no prtys, bidders, etc. sh be deemed per permitted to acquire any rights or interests as result of this permitted opening of bids. (ENT 5-29-81) Mld Notc
5/28/81	sb		Fld reporter transcript of proceeding on 5/27/81
5/27/81	sb	72.	MIN ORD: Crt grant inpart prelim inj & ord no bond to be post as to CA.
6/10/81	kt	73.	MIN ORD: stat conf; crt ORDS x-mots for S/J be fld 6-19-81, resp to be fld 7-2-81 & hrg set 7-10-81 at 10am; cys of papers to be delive to law office & chambers; crt fur ORDS defts have 60 days to ans
6/12/81	dv	74.	Fld deft/intervenors AMENDED ANSWER to COMPLAINT
6/15/81	sb	75.	MIN ORD: cnsl to file statmnt of genuine issue of material fact & prop finding & judg by 7-2-81 crt take motn to intervene under submission
6/19/81	sb	76.	Fld pltf's notc of lodging docs
		77.	Fld pltf memo of P/A in suppt of pltf motn for S/J
		78.	Fld pltf's notc of motn & motn fr S/J retble 7-10-81 10am
	sb	79.	Fld intervention aff of Irwin D. Karp
		80.	Fld intervention memo of P/A in suppt of motn fr S/J
		81.	Fld intervention notc of motn fr S/J retble 7-10-81 10am
6/22/81	sb	82.	Fld notc regarding Coastal State organization brief on S/J

6/25/81	sb	83. Fld table of author
6/25/81	sb	84. Fld pltf Stip & Ord (MRP) modifying prelim inj
		85. Fld 3rd notc of lodge docs given to clrk
7/2/81	dv	LODGED pltfs' prop findgs of fct & concl of law LODGED pltfs' prop S/J LODGED pltf State of Calif's prop findngs of fct & concl of law in suppt of prelim inj
7/2/81	dv	86. Fld pltf-in-intrvntn Local Govts' reply memo re x-motns for S/J & WOGA intrvnrs' motn to dsms
		87. Fld intrvnr-defts' Opinion in No Oilport v. Carter, Civ no C80-360M (WD Was)
		88. Fld intrvnr-deft Chevron USA, Inc's reply memo in suppt of motn for S/J
		89. Fld intrvnr-deft Chevron USA, Inc's reply memo in suppt of motn to dsms cmpl of NRDC, et al, & Co. of Humboldt, et al, for lack of standing
		90. Fld intervnr-deft Chevron USA Inc's stmt of genuine issues of fct & law
		91. Fld State of Oregon's brief of Amicus Curiae
		92. Fld pltfs' aff of Trent W.Orr
		93. Fld pltfs' reply memo in suppt of NRDC's motn for S/J
		94. Fld pltf State of Calif's memo of P&A in oppsn to defts' motns for S/J
		95. Fld pltf State of Calif's stmt of genuine issues
		96. Fld amicus Curiae A/G of Massachusetts' memo in suppt of pltfs' motn for S/J
7/6/81	dv	97. Fld So. Carolina Coastal Council's motn & ORD(MRP) to appear pro hac vice & to fil amicus curiae brief; amicus curiae brief
		98. Fld pltfs-in-intrvntn local govts' stmt of issues & prop findngs of fct — concl of law

		99.	Fld pltfs-in-intrvntn local govts' FIRST AMENDED COMPLAINT seeking review of an administratv decision, declar & inj relief, & mandamus
7/7/81	dv	100.	MIN ORD: On Crt's own motn the motn to dsms & all motns for S/J set for 7/1 are contd to 7/17/81 at 10 am
7/16/81	dv	101.	Fld intervenor-defts' ANSWER TO FIRST AMENDED COMPLAINT of pltf-intrvenor local govts
7/13/81	sb	102.	Fld memo of AMICUS CURIAE state of Alaska in suppt of pltf motn fr S/J
		103.	Fld pltf's notc of motn supplement the complt pur to F.R.C.P. rule 15 memo of P/A IN SUPPT THEREOF RETBLE —/3/81 10 am
7/10/81	sb	104.	Fld pltf's notc of motn to supplemental the compl pur to ruel 15 8/3/81
		105.	Fld pltf memo of P/A in suppt of motn to supplemtnal the complt
		106.	Fld applic fr permission to file Amicus Curiae Brief
		107.	Fld Ord (MRP) granting permission to file Amicus Curiae Brief
7/13/81	sb	108.	Fld Federal deft resp to ex parte applic by stat of CA to amend complt
7/10/81	sb	109.	Fld Amicus Curiae Brief on behalf of San Luis Obispo County area council gov't in suppt of pltf & pltf in intervention
7/14/81	sb	110.	Fld stat of CA ex parte Ord (MRP) settlemnt complt on 7/17/81 10 am
		111.	Fld. notc of obj the depart of interior administrative record
		112.	Fld ex parte applic fr ord shortenting ti & fr cal on othr than motn day declar memo of P/A suppt thereof
7/16/81	cm	113.	Fld intrvnr-dft's memo in oppos to pltf's mtns to suplmnt complt.
		114.	Fld fed dfts' oppos to mtns to suplmnt compltzzs.

7/23/81	dv	115.	Fld fed defts' ANSWER TO FIRST AMENDED COMPLAINT of local govts
*7/17/81	dv	116.	MIN ORD: Hrg 1) pltfs motn to supplt the cmplnt & motn for S/J; 2) interv-de motn for S/J & motn to dsms; 3) Fed defts motn for S/J: Crt DENIES motn to supplmnt the cmplnt. Crt taks matr under submisn & cont to 7/27/81 at 9 am for Crt's rulng. Crt to grant a 30 dy stay at time of rulng.
7/23/81	dv	117.	Fld federal defts' ANSWER TO COMPLAINT of California
7-27-81	kt	118.	Stay ORD(MRP) that enforcmt of jdmt of 7/27/81 shall be stayed for 45 days to permit appellate proceedgs, as fur specified 2/in this ord
		119.	Fld Stay ORD(MRP) that enforcmt of jdmt of 7/27/81 shall be stayed for 45 days until 9/10/81; fur ord that OCS Lease Sale 53, etc is tolled 45 days, secy of Interior isempowered to cont to hold bids for thoe tracts opened on 5/28/81 & not considered rejected on 7/27/81; fur ORD that crt's prelim injunc of 5/28/81 shall be cont in effect for 45 days as to certain tract numbers as fur specified 2/in this ord
		120.	Fld Stip & ORD re all materials lodged by all ptys w/crt are considered part of the record of the Crt's determinatn of this case
7/27/81	dv	121.	MIN ORD: Hrg on Crt's rulng on pltfs motn to suppl the cmplnt, motn to dsms & S/J motns: Crt GRANTS Co of San diego's motn to intrven tkn under subt on 6/15/81. GRANTS & DENIES in part motn to dsms & motns for S/J. DENIES motn to supplement the cmplnt. GRANTS a 45 dys stay. Crt to fil writn opinion by 8/4/81
		122.	Fld ORD(MRP) re inj ent 7/27/81 (see ord)

8/18/81	cm	123.	Fld Opinion (MRP). (ENT 8/18/81) mld cpies & notc of ent.
		124.	Fld ORD(MRP) grantng dft-intrvnr's mtn to dism in NRDC vs Watt Mtn to dism in Calif vs Watt denied. (ENT 8/18/81) mld cpies notices. MD-JS-6
		125.	Fld ORD(MPR) grantng pltf's mtn fr S/J. Mtn fr S/J re pltf's claim arisng undr Coastal Zone Management Act denied. Crt fun ORDS(MRP) dfts & dft-intrvnr's enjoind frm certain actns. Dft mtn fr S/J re claims undr Outer Continental Shelf Lands Act grantd. Pltf's mtn fr S/J re claims undr certain statutes den Dft-intrvnr's mtn to dism pltf's Natural Resources Defense Council grantd. Dft-intrvnr's mtn to dism pltf-intrvnrs Count of Humboldt denied, each prty to bear own costs. crt shall re cont jurisdctn ovr this case to ensure compliance w/ord. (ENT 8/18/81). mld cpies & notc of entry.
8/19/81	am	126.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm ord ent 8/18/81. $70.00 flng & docket fees pd.
8/19/81	am	127.	Fld deft govt's NOTC OF APPEAL to 9th Cir C/A frm ord ent 8/18/81.
8/26/81	ag	128.	Fld deft transcrpt designatn
8/31/81	dv		Lodged copy of ord frm USCA, 9th Cir, grantg appellants' motn for partial stay p appeal. Perm inj from DC ent 8/18/81 is stayd til 14 dys aftr mandate of the Appellants' motn for expeditd review is grantd
9/16/81	lw	129.	Fld pltfs' NOTC OF APPEAL to 9th Cir C/A frm ORD ent 8/18/81 $70.00 fldng & docket fees pd.
9/18/81	dv	130.	Fld deft Western Gas's amdd transcrpt desig & ordering form on appeal
9/18/81	dv	131.	Fld pltf's trnscrpt desig & orderng form on appeal

PLAINTIFFS

NATURAL RESOURCES DEFENSE COUNCIL, INC., THE SIERRA CLUB; FRIENDS OF THE EARTH; FRIENDS OF THE SEA OTTER; AND THE ENVIRONMENTAL COALITION ON LEASE SALE 53,

DEFENDANTS

JAMES G. WATT, in his official capacity as Secretary of the United States Department of the Interior; the UNITED STATES DEPARTMENT OF THE INTERIOR; ED HASTEY, in his official capacity as Acting Director of the United States Bureau of Land Management; ROBERT BURFORD, Director-Designate of the United States Bureau of Land Management in his official capacity as Director when and if assumed; and the UNITED STATES BUREAU OF LAND MANAGEMENT,

DATE	NR.		PROCEEDINGS
4/29/81	jdc	1.	Fld Complt. Issd Summs. Case may be ref to Mag Kronenberg for dscvry.
		2.	Fld Pltfs' Notc of related case purs to LR 2(g).
5/1/81	dv	3.	Fld pltfs' motn for prelim inj, retbl 6/1/81 at 10 AM
		4.	Fld pltfs' memo of P&A in supt LODGED Pltfs' prop prelim inj
5/1/81	yd	5.	Fld defts declaratn of James R. Arnold
	yd	6.	Fld Fed defts Ex Parte applicatn w/declaratn for settng of schedule for briefn & hrg on pltfs' motn for prelim injunctn
5/4/81	cm	7.	Fld ORD(MRP,RJK) transfrng actn to Mariana R. Pfaelzer for all future procedngs. parties notfd. Case may be referred tomagistrate MacMahon for disc.
5/7/81	sb	8.	Fld Ord the pltf's motn prelim inj be held 522-81 10 am
		9.	Fld Stip & Ord(MRP) for consolidaton of case no. 81-2080
5/22/81	sb	10.	Fld Answer of appli for INTERVENTION to complt of NRDC et al
		11.	Fld pltf's proof of serv/acknowledge of serv
5/28/81	sb	12.	Fld motn to appear as AMICUS CURIAE
		13.	Fld applic for admins pro Hac Vice

5/19/81	sb	14.	Fld retn summs serv to Robert Burford, 5-4-81 & United states Bureau on 5-5-81 & United state bureau of Land Management on 5-5-81 & Edward Hasty, Acting Director, of Bureau of Land managements on 5-5-81
6/12/81	sb	15.	Fld intervenor-def amended answer to complt NRCD etal
	sb	16.	Fld Stip & Ord subst of parties in intervention
6/19/81	sb	17.	Fld notc of motn for S/J; memo of P/A in suppt thereof retble 7-10-81 10 am
7/2/81	sb	18.	Fld Federa; deft's reply memo in suppt of their motn fr S/J
		19.	Fld local gov't pltf reply memo re corss-motn fr S/J & Woga intervene motn to
7/23/81	sb	20.	Fld Federal deft's ANSWER TO COMPLT of natural Resource defense Council Inc E
8/18/81	cm	21.	Fld Opinion (MRP). (ENT 8/18/81) mld cpies & notc of ent.
		22.	Fld ORD(MRP) grantng dft-intrevnr's mtn to dism in NRDC vs Watt. Mtn to dism in Calif vs Watt denied. (ENT 8/18/81) MD-JS-6 mld cpies & notc of ent.
		23.	Fld Fld ORD(MRP) grantng pltf's mtn fr S/J. Mtn fr S/J re pltf claim arisng undr Coastal Zone Management Act denied. Crt Fur ORD(MRP) dfts & dft-intrvnr's enjoind frm certain actns. Dft's fr S/J re claims undr Ounter Continental Shelf Lands Act grantd Pltf's mtn fr S/J re claims undr certain statutes denied. Dft-intrvnr's mtn to dism pltf's Natural Resources Defense Council grantd. Dft-intrvnr's mtn to dism pltf-intrvnr's County of Humboldt denied, each prty to bear own costs. Crt shall retain cont jurisdctn ovr this case to ensure compliance w/ord. (ENT 8/18/81). Mld cpies & notc of ent.
8/19/81	am	24.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm ord ent 8/18/81.

8/19/81	am	25.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm ord ent 8/18/81.
	sb	26.	Fld respondent proof of serv or ORD onmotn
	sb	27.	Fld transcript designation & deft,
9/18/81	sb	28.	Fld req fr copy of transcript

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 81-2080-MRP(Mx)
Filed: Apr. 29, 1981

THE STATE OF CALIFORNIA, ACTING BY AND THROUGH GOVERNOR EDMUND G. BROWN, JR., THE CALIFORNIA COASTAL COMMISSION, THE CALIFORNIA AIR RESOURCES BOARD, THE CALIFORNIA RESOURCES AGENCY, THE CALIFORNIA DEPARTMENT OF FISH AND GAME, THE CALIFORNIA DEPARTMENT OF CONSERVATION,
PLAINTIFFS,

v.

JAMES G. WATT AS SECRETARY OF THE INTERIOR; THE UNITED STATES DEPARTMENT OF INTERIOR; EDWARD HASTEY AS ACTING DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT BURFORD AS DIRECTOR DESIGNATE OF THE UNITED STATES BUREAU OF LAND MANAGEMENT, IN HIS OFFICIAL CAPACITY AS DIRECTOR WHEN AND IF ASSUMED; AND THE UNITED STATES BUREAU OF LAND MANAGEMENT,
DEFENDANTS.

REVIEW OF ADMINISTRATIVE ACTION
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MANDAMUS

Plaintiff, the State of California, alleges:

DESCRIPTION OF THE ACTION

1. This action for declaratory and injunctive relief and for relief in the nature of mandamus seeks to review the final decision of April 28, 1981 of the Secretary of the Interior ("Secretary") to lease certain areas off of the central California coast in the Santa Maria Basin for the exploration, development and production of oil and gas resources, i.e. the decision to lease the Santa Maria Basin. This action seeks to prevent the Bureau of Land Management from leasing 34 of the 115 tracts in this lease sale which is currently scheduled for May 28, 1981. This action also seeks to require the Secretary and the Department of the Interior ("Department") to conduct consistency reviews pursuant to the Coastal Zone Management Act (16 U.S.C. § 1456(c)).

JURISDICTION

2. The jurisdiction of the Court is invoked pursuant to:

(a) The provisions of 28 U.S.C. § 1331(a) and 28 U.S.C. §§ 2201-2202, this being an action for declaratory and injunctive relief arising under the Constitution and laws of the United States;

(b) The provisions of 28 U.S.C. § 1361, this being an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff;

(c) Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which provides for the judicial review of actions of federal agencies;

(d) 43 U.S.C. §§ 1349(a)(1) and 1349(b)(1) of the Outer Continental Shelf Lands Act Amendments of 1978;

(e) The provisions of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.;

(f) 16 U.S.C. § 1540(c) of the Endangered Species Act.

VENUE

3. Venue in the United States District Court for the Central District of California is proper in this case both because this is the judicial district in which a defendant resides or may be found and because this is the judicial district nearest the place where the cause of action arose. (28 U.S.C. § 1391; 43 U.S.C. § 1349(b)(1).)

PARTIES

4. Plaintiff in this action is the State of California acting by and through the Governor and the following State agencies, all of which participated in the administrative process which culminated in the decision to lease the northern 34 tracts in the Santa Maria Basin:

(a) Edmund G. Brown, Jr., is Governor of the State of California and as such, participated extensively in the administrative process. A part of this participation was the submission of extensive recommendations and comments pursuant to section 19(c) of the Outer Continental Shelf Lands Act Amendments [43 U.S.C. § 1345(c)] concerning the size, timing and location of the lease sale.

(b) The California Coastal Commission ("Coastal Commission") is charged with implementing the California Coastal Act of 1976 (Cal. Pub. Res. Code § 30000 et seq.) and is designated as the State coastal zone planning and management agency for any and all purposes and may exercise any and all powers set forth in the Coastal Zone Management Act (16 U.S.C § 1451 et seq.; "CZMA") that relate to the planning or management of the coastal zone (Cal. Pub. Res. Code § 30330). The Coastal Commission repeatedly commented that the decision to lease the northern 31 tracts in the basin was inconsistent with California's federally approved Coastal Management Plan, and repeatedly requested that a consistency determination be conducted by the Department.

(c) The California Air Resources Board ("CARB") is the State agency charged with coordinating, encouraging and reviewing the efforts of all levels of government to attain and maintain ambient air quality standards for the State (Cal. Health & Safety Code §§ 39003, 39500). The CARB is

also the designated air pollution agency for all purposes set forth in federal law including the preparation of the State implementation plan. (Cal. Health & Safety Code § 39602.) The CARB commented regarding deficiencies in the Environmental Impact Statements prepared for the lease sale and noted the adverse air quality impacts of the lease sale.

(d) The California Resources Agency is generally responsible for the protection of the various environmental and natural resources of the State (Cal. Gov. Code § 12805.) The Resources Agency is also responsible for administration of the California Environmental Protection Program. (Cal. Pub. Res. Code §§ 21190-21193.)

(e) The California Department of Fish and Game is charged with establishing criteria for determining whether a species of mammal, bird, fish, amphibia or reptile is rare and endangered and is further charged with inventorying said threatened species. (Cal. Fish and Game Code §§ 900-902.) The Department of Fish and Game is also charged with encouraging the proper maintenance and utilization of the living resources of the ocean. (Cal. Fish and Game code §§ 1700 et seq.)

(f) The California Department of Conservation is charged with the supervision of oil and gas drilling, operation and maintenance so as to prevent damage to life, health and natural resources, to prevent loss or damage to oil and gas deposits or the loss of oil and gas reservoir energy. (Cal. Pub. Res. Code §§ 603, 607, 3106.)

5. The State of California acting by and through the Governor and these State agencies has a valid legal interest which is or may be immediately and adversely affected by leasing the 34 northern tracts in the Santa Maria Basin for oil and gas exploration, development and production, and may therefore maintain this action seeking compliance with the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1349(a)(1), 1349(a)(3).

DEFENDANTS

6. James G. Watt is the Secretary of the Interior. In such executive capacity he has the authority pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331,

et seq., to lease offshore tracts on the Outer Continental Shelf for oil and gas exploration and development. His decisions are subject to and restricted by the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq.; the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706; the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq.; and the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq.

7. The Department of the Interior is a part of the executive branch of the federal government. The Department of the Interior and its personnel, acting by and through the Department, are subject to the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq.; NEPA, 42 U.S.C. § 4321, et seq.; APA, 5 U.S.C. §§ 701-706; ESA, 16 U.S.C. § 1531 et seq.; and CZMA, 16 U.S.C. § 1451 et seq.

8. Edward Hastey is the Acting Director of the Bureau of Land Management, a part of the Department of the Interior. Until such time as the permanent Director is confirmed by the United States Senate, he has the responsibility to administer leasing on submerged lands on the Outer Continental Shelf; to evaluate fully the potential effect of a leasing program on the total environment; to develop any special leasing stipulations necessary to protect the environment and other resources; and to publish proposed and final notices of sales. (43 C.F.R. Part 3300.)

9. Robert Burford is the Director-Designate of the Bureau of Land Management. If and when he is confirmed by the Senate for the directorship, he will assume the responsibilities presently vested in Acting Director Hastey as set forth in the preceding paragraph.

10. The Bureau of Land Management is an agency of the Department of the Interior, some of whose employees, acting on behalf of the Secretary or the Director, aid them in the performance of their duties regarding hydrocarbon activities on the OCS.

FACTS

11. On November 29, 1977, a Call for Nominations and Comments was issued by the Bureau of Land Management

("BLM"). The area under consideration covered 10,742,183 acres on the central and northern California OCS. The Call requested the petroleum industry to designate specific tracts on which it would like to bid if a sale were held. Government agencies and other groups were asked to identify tracts that they believed should be excluded from oil and gas leasing or leased under more stringent restrictions due to conflicting resource values or environmental factors.

12. Following the Call for Nominations and Comments, BLM announced that 27 oil companies had nominated 8,440,116 acres and that 47 comments from federal, state and local governmental agencies and other groups had been received indicating general concerns about offshore leasing or recommending that specific tracts be deleted.

13. Tentative tract selection was announced on October 10, 1978, with 243 tracts to be intensively studied for proposed Lease Sale 53. BLM later established for the final environmental impact statement that the total sale area would involve 242 tracts comprising 1.315 million acres.

14. On May 4, 1979, BLM announced its intention to prepare an environmental impact statement to consider the effects of proposed Lease Sale 53 offshore central and northern California. The Draft Environmental Impact Statement (DEIS) was issued in April 1980 and examined the proposed development of five basins—Eel River, Bodega, Point Arena, Santa Cruz and Santa Maria.

15. California State agencies participated in the review of the DEIS by providing extensive comments on the draft statement. Among the comments provided by the State and its agencies were many which pointed out the numerous deficiencies of the DEIS. California also repeatedly requested the Department to make a consistency determination pursuant to the Coastal Zone Management Act (16 U.S.C. § 1456) and pointed out the dangers posed by the sale to threatened and endangered species listed pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 et seq.

16. Moreover, during 1979 and 1980 when the 5 year national oil and gas leasing program was being promulgated pursuant to 43 U.S.C. § 1344, California filed with the Department extensive comments raising many of the same

concerns as were raised in its comments on the environmental impact statements and Lease Sale 53.

17. The final environmental impact statement ("FEIS") on Lease Sale 53, released in September 1980, contained an Addendum at page xii which presented revised estimates by the United States Geological Survey of the hydrocarbon reserves present in the five basins. According to the Addendum, the new estimates for the Santa Maria Basin were "roughly twice the amount assumed in the draft and final EIS analyses." No supplemental analyses of the potential environmental effects of oil leasing in the Santa Maria Basin based upon the new estimates were made or circulated to the public and government agencies, pursuant to the National Environment Policy Act ("NEPA").

18. On October 16, 1980, former Secretary of the Interior Cecil Andrus announced the proposed notice of sale for Lease Sale 53. In the proposed notice, the four northern basins—Eel River, Point Arena, Bodega and Santa Cruz—were deleted. The only basin proposed for leasing was the Santa Maria Basin.

19. On December 24, 1980, Governor Brown submitted extensive recommendations and comments pursuant to 43 U.S.C. § 1345(c) concerning the lease sale in the Santa Maria Basin, the only basin remaining in the sale. Among other matters, the Governor objected to the leasing of the northern tracts of the Basin because such leasing would jeopardize the continued survival of the southern sea otter.

20. On February 10, 1981, Secretary of the Interior James G. Watt, issued a revised proposed notice of sale in which the four northern basins deleted by former Secretary Andrus were placed back in the sale. Secretary Watt stated that he took this action in order to provide an opportunity for Governor Brown to submit recommendations concerning the size, timing and location of the sale. The Governor was allowed 60 days to comment on the proposed notice of sale.

21. On April 9, 1981, the Governor's recommendations were hand-delivered to the Office of the Secretary at 12:15 p.m. Submitted was a recommendation 51 pages long as well as recommendations from State agencies and local governments which totalled almost 500 pages. The Governor

also incorporated by reference a series of prior communications that involved nearly 1000 pages of material.

22. The governor made several specific recommendations regarding the Santa Maria Basin. He recommended that leasing proceed in 81 southern tracts in the basin once environmental studies were completed and air quality problems resolved. Regarding the remaining northern tracts, which stretch offshore from Morro Bay to Point Sal, the Governor recommended deletion of a total of 34 tracts for several reasons:

(a) 34 tracts (129-155 and 158-164) were recommended for deletion to protect the Southern sea otter, a threatened specie, and other marine life such as the gray whale, seabirds and fisheries;

(b) Thirty-one tracts (129-155 and 158-161) were recommended for deletion to protect recreation and tourism in the area;

(c) Eleven tracts (131, 134, 138, 146, 147, 151, 152, and 161-164) were recommended for deletion to protect against geological dangers; and

(d) 14 tracts (129-134, 154, 155, 158-160, and 162-164) were recommended for deletion based on consideration of marine safety and the potential impacts of tanker accidents. (The tracts were illustrated in FEIS, visual No. 1.)

The Governor also noted that because the seas are often high in the northern part of the basin, oil spill containment would frequently be ineffective. Finally, the Governor recommended that steps be taken to protect onshore air quality from the adverse impacts associated with OCS developments.

23. In a press release issued at 10 a.m. April 10, 1981, Secretary Watt stated that he intended to lease the entire Santa Maria Basin in May 1981 based on a finding of an overriding national interest. The Secretary also announced that a decision on the remaining four basins would be made in May or June 1981. The Secretary stated that in balancing national interest against local interest, the national interest, measured solely in terms of the value of the oil and gas to be recovered, always would outweigh the well-being of the citizens of the affected coastal states.

24. On April 27, 1981, the Final Notice of Sale for the Santa Maria Basin was published by the Secretary and the Department. (46 Fed. Reg. 23674.) In that notice, the actual sale was scheduled for May 28, 1981. Every tract in the Santa Maria Basin proposed for leasing in the proposed notice of sale was included in the final notice. Each and every recommendation of Governor Brown concerning the size, timing and location of the lease sale was rejected. The Secretary gave no explanation beyond that included in the press release of April 10 of his reasons for rejecting all of Governor Brown's recommendations.

25. The northern Santa Maria Basin is habitat of and is adjacent to habitat of a number of marine mammals, including the southern sea otter and the gray whale.

26. The southern sea otter has been listed as a threatened species under the Endangered Species Act of 1973 since January 14, 1977. (50 C.F.R. § 17.11, pp. 63, 79.) The gray whale has been listed as an endangered species under the Act and its predecessor, the Endangered Species Conservation Act of 1969, since June 2, 1970. (50 C.F.R. § 17.11, pp. 65, 79.)

27. The best available estimate of the present size of the southern sea otter population is 1,443, estimated in 1979. The figure is a small fraction of its former population size. According to the Lease Sale 53 FEIS, the present size of the gray whale population is 15,000.

28. Virtually the entire gray whale population migrates through the Santa Marin Basin area twice a year. In November through January, the bulk of the southward migration occurs. In February through April the bulk of northward migration occurs. The FEIS admits that oil population may harm or destroy whales through skin exposure, inhalation of oil, and ingestion of oil, both directly and through contaminated food supplies.

29. The FEIS acknowledges that an oil spill could have a disastrous effect on the southern sea otter. Its entire population is distributed between Pismo Beach and Santa Cruz, and between the Santa Maria Basin and Santa Cruz Basin, which the Secretary may offer for lease in June. The otters are particularly sensitive to oil contact because their fur

acts as their chief insulation from cold water, and contact with oil destroys the insulating ability of the animals' fur, leading to death from exposure. Additional dangers are posed by ingestion of oil-contaminated food. A large spill could destroy a major portion of the otter population.

30. The Department and the BLM, pursuant to 16 U.S.C. § 1536(a)(2) and (b), consulted with the Secretary of Commerce, through the National Marine Fisheries Service, and with the defendant Secretary himself, through the United States Fish and Wildlife Service, about the likelihood of Lease Sale 53 jeopardizing, 1) whales and sea turtles and 2) sea otters, respectively. The biological opinions which were rendered, concluded that leasing and exploration activities were not likely to jeopardize any of these species although development activities might.

FIRST CLAIM

THE LEASE SALE OF THE 34 NORTHERN TRACTS IN THE SANTA MARIA BASIN CANNOT BE ALLOWED TO PROCEED BECAUSE SECRETARY WATT HAS MISINTERPRETED AND MISAPPLIED SECTION 19 [43 U.S.C. § 1345] OF THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978 [43 U.S.C. § 1331 et seq.]

31. Plaintiffs incorporate by reference the allegations of Paragraphs 11 through 24 above with the same force and effect as if set forth in full herein.

32. In 1978, Congress enacted the Outer Continental Shelf Lands Act Amendments ("OCSLAA") as a comprehensive revision of the Outer Continental Shelf Lands Act of 1953. Among the goals of the Congress was that the discretion of the Secretary of the Interior with regard to OCS oil and gas leasing be curbed and that the affected coastal states be given a leading role in OCS decisionmaking.

33. Section 19 of OCSLAA (43 U.S.C. § 1345) is the tool by which states are to have their leading role in OCS decisionmaking as to individual lease sales. The section provides that the governor of an affected state may submit recommendations on the size, timing and location of a proposed lease sale. Subsection (c) of § 19 further provides that the Secretary "shall accept recommendations of the

Governor ... if ... they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." "National interest" is defined in terms of recovering oil and gas in a "balanced manner" and in terms of the findings, purposes and policies of OCSLAA. "National interest" therefore means much more than simply recovering oil and gas."National interest" includes the interest that leasing proceed in a balanced manner, that the marine, human and coastal resources be preserved, that competing uses of the sea be preserved, and that recreational uses of the coast be preserved.

34. In balancing the national interest and the well-being of the citizens of the affected state, the governor's recommendation is critical. Congress intended this recommendation to play a leading role in decisions on the size, timing and location of lease sales. Congress manifested this intent by directing the acceptance of the governor's balanced recommendation.

35. Governor Brown submitted detailed, specific recommendations concerning the size, timing and location of leasing in the Santa Maria Basin. These recommendations provided for a reasonable balance between the national interest and the well-being of the citizens of California by recommending that leasing proceed in the 81 southern tracts and that the 34 northern tracts not be leased. Therefore, pursuant to § 19, the Secretary was required to accept Governor Brown's recommendation.

36. The Secretary has, however, misinterpreted the OCSLAA and has taken an unbalanced, and unsupported view of the requirements of § 19. He has determined that "national interest" means only the recovery of oil and gas resources and nothing more. This is in direct conflict with the language of § 19 and the legislative history of the section. Moreover, the Secretary has determined that the well-being of the citizens of California can never outweigh the "national interest" and that the national interest is served only by leasing and exploring for oil. The Secretary has decided that the states have only parochial interests at heart, are opposed to all OCS development, and have no decision authority under the OCSLAA.

37. A controversy presently exists between plaintiffs and defendants concerning the legal rights and duties of the respective parties concerning § 19 of the OCSLAA. Plaintiffs desire a declaration that the Secretary has misinterpreted the OCSLAA and § 19 and that because of his erroneous interpretation of the law, the Secretary has improperly performed the balancing required under § 19 and has illegally rejected the recommendations of Governor Brown.

SECOND CLAIM

BECAUSE SECRETARY WATT'S DECISION REJECTING GOVERNOR BROWN'S RECOMMENDATION WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION AND IT MUST BE REVERSED AND THE SALE OF THE 34 NORTHERN TRACTS CANNOT BE ALLOWED TO PROCEED

38. Plaintiffs incorporate by reference the allegations set forth in Paragraphs 11 through 24 above with the same force and effect as if set forth in full herein.

39. The Secretary is required to give the Governor's recommendation full and careful consideration. Governor Brown's recommendation was 51 pages long and incorporated by reference many other California comments nearly 1000 pages long. Accompanying the Governor's recommendation were nearly 500 pages of state agency and local government comments and recommendations. The Secretary rejected all of this material after it had been in the possession of the Department less than 22 hours. This unseemly haste in rejecting these recommendations was clearly arbitrary and capricious.

40. Secretary Watt's rejection of Governor Brown's recommendation was also arbitrary, capricious and an abuse of discretion because the Governor's recommendation struck the appropriate balance between the national interest and the well-being of the citizens of California. Instead of giving these balanced recommendations the great weight intended by Congress, the Secretary gave them no weight at all. Instead of considering all the relevant factors, the Secretary considered only his belief that all resources must be recovered.

41. Unless the lease sale of the 34 northern tracts planned for May 28, 1981, is enjoined, plaintiffs will be irreparably injured. Section 19 provides that primary tool for the involvement of the coastal states in the OCS leasing process. The opportunity to make recommendations on a lease sale decision which the Secretary must accept occurs only once, and if the sale of these 34 tracts proceeds, the impact of Governor Brown's recommendation will be irretrievably lost. Moreover, if the lease of the 34 tracts is allowed to proceed, there will be an irretrievable and irreversible commitment of resources.

42. Plaintiffs have no speedy, adequate or complete remedy at law to address the wrong herein alleged, and this action for injunction and other relief is plaintiffs' only means of securing relief.

43. An immediate enjoining of leasing of tracts 129-155 and 158-164 in the Santa Maria Basin until defendants have complied with applicable provision of federal law is the only means of preserving the status quo.

THIRD CLAIM

THE LEASING OF THE NORTHERN 34 TRACTS IN THE SANTA MARIA BASIN SHOULD NOT BE ALLOWED TO PROCEED UNTIL THE FINAL NOTICE OF SALE HAS BEEN RENDERED CONSISTENT WITH CALIFORNIA'S FEDERALLY APPROVED COASTAL MANAGEMENT PLAN

44. The Coastal Zone Management Act (16 U.S.C. § 1451 et seq.) was designed by Congress to encourage States to develop comprehensive management programs for their coastal zones. A central part of this design was the promise that federal activities which impacted on a State's coast would have to be conducted in a manner consistent with the State's approved coastal management plan. (16 U.S.C. § 1456.) Congress intended such consistency to extend to energy facility siting and the final notice of sale for offshore oil leases.

45. Pursuant to 16 U.S.C. § 1456, federal agencies which conduct activities "directly affecting" the coastal zone shall conduct those activities to the maximum extent practicable in a manner consistent with a State's approved manage-

ment program. The agency charged with implementing § 1456, the National Oceanic and Atmospheric Administration ("NOAA") has promulgated regulations to the effect that federal activities on the OCS are subject to review to determine whether they directly affect the coastal zone. (15 C.F.R. § 930.33(c); 44 Fed. Reg. 37146.)

46. California's Coastal Zone Management Plan was approved by the Department of Commerce on November 7, 1977.

47. The Department of Interior has consistently rejected NOAA's position and has argued that the only activities directly affecting the coastal zone are those doing so "without intervening cause."

48. In 1979, the Department of Justice issued an opinion concluding that pre-leasing activities of the Secretary of the Interior were subject to the consistency requirements of the Coastal Zone Management Act.

49. Throughout the administrative procedures leading to federal oil and gas lease sales offshore of California, the Coastal Commission has regularly sought to have the Department of Interior conduct a consistency review for the final notice of sale of OCS leasing activities. The Department of Interior refused to apply consistency review to the final notice of sale for Lease Sale 48 (Southern California) and continued to assert that, with the exception of a very restricted category of lease stipulations, prelease activities in general and the final notice of sale in particular do not directly affect the coastal zone.

50. The Coastal Commission sought mediation following the Department's refusal to apply consistency to Lease Sale 48. Although the mediator concluded that the mediation had failed because of the Department's refusal to alter its position on the meaning of "directly affect," he did adopt California's position that the Department had adopted an unduly restrictive definition of "directly affect" and that the Coastal Zone Management Act contemplated a consistency determination regarding pre-lease sale activities.

51. Throughout the administrative process which has culminated in the Santa Maria Basin Lease Sale, the Coastal Commission has sought a consistency determination re-

garding the final notice of sale. The Secretary of the Interior has steadfastly refused to do so and instead has sought to convince the Secretary of Commerce to have NOAA alter its regulations.

52. The Coastal Commission, has long argued, and has so argued regarding this sale, that of the various pre-lease sale activities, only the final tract selection and lease stipulations, i.e. the final notice of sale, do directly affect the California coastal zone. The decision to offer leases for specific tracts is the key activity that creates a right to develop those leases. The lease sale sets the initial boundaries on oil development on the OCS and is a subdivision of the OCS. The decision to lease is also a key planning point for both coastal States and the petroleum industry. The decision to lease basically determines which areas will bear the burden of oil and gas development—burdens such as oil spills, vessel collisions, harm to recreation and tourism, and increased onshore industrialization.

53. The Coastal Commission has informed the Department that the deletion of 31 tracts in the northern portion of the Santa Maria Basin is necessary for the leasing of the basin to be consistent with the California Coastal Management Plan.

54. The Department of Interior's refusal to conduct a consistency determination despite the direct impacts on the coastal zone of the final notice of sale is therefore a clear violation of the Coastal Zone Management Act.

55. A controversy presently exists between plaintiffs and defendants concerning the legal rights and duties imposed by the CZMA, 16 U.S.C. § 1456. Plaintiffs desire a declaration that the final notice of sale (tract selection and lease stipulations) directly affects the coastal zone and requires a consistency determination. Plaintiffs further desire that defendants be ordered to conduct said consistency determination and to comply with all applicable procedures attendant on said determination.

56. Plaintiffs request the Court to retain jurisdiction of this matter until the consistency determination has been made and the Coastal Commission concurs in the determination. Moreover, the Department should not be allowed to

proceed with the proposed activity until 90 days after the consistency statement is prepared. (15 C.F.R. § 930.41(c).)

57. Unless the lease sale of the 34 northern tracts is enjoined, plaintiffs will be irreparably injured in that a federal activity directly affecting the coastal zone will have occurred without the requisite consistency determination and without the following of applicable procedures. Also, conducting the lease sale as to these tracts would cause an irretrievable and irreversible commitment of resources.

58. Plaintiffs have no speedy, adequate or complete remedy at law to address the wrong herein alleged and this action for injunctive and other relief is plaintiffs' only means of securing relief.

59. An immediate enjoining of the planned lease sale as to the northern 34 tracts is necessary to retain the status quo until defendants have complied with applicable federal law.

FOURTH CLAIM
DEFENDANTS VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

60. Section 102(C) of NEPA, 42 U.S.C. § 4332(C), and the regulations of the Council of Environmental Quality thereunder, 40 C.F.R. Part 1500 ("CEQ Regulations"), require a detailed examination of the potential environmental impacts of any major federal action, based on the best available data, to be prepared and circulated to the public and government agencies and officials for their information comment.

61. The CEQ Regulations specifically require that federal agencies must prepare supplements to EIS's if there are significant new circumstances or information bearing on a proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(ii). Such a supplement must be prepared, circulated, and filed in the same manner as a draft and final statement. 40 C.F.R. § 1502.9(c)(4).

62. The revised estimates of the United States Geological Survey ("USGS") doubling the expected oil reserves of the Santa Maria Basin constitute significant new information bearing upon the proposed lease sale and its impacts.

The greatest risk to the marine and coastal environments from offshore oil development is that of oil spills. The degree of risk of oil spills is directly related to the amount of oil present in an offshore basin.

63. The failure of the defendants to prepare and circulate a supplemental EIS on the potential impacts of hydrocarbon development in the Santa Maria Basin based upon the USGS's current estimates of reserves violated the requirements of NEPA and the CEQ Regulations. The public and government officials have been denied the right to examine and criticize the proposed action with regard to the Santa Maria Basin in light of an assessment of risks based upon the best available data.

64. Further, because the impacts predicted in the EIS were based on the outdated lower estimates, adequate mitigation measures for the likely impacts of oil development in the Santa Maria Basin were never explored nor submitted to the public as required by 40 C.F.R. § 1502.16(h) of the CEQ Regulations.

65. Unless the lease sale for the northern 34 Santa Maria Basin tracts planned for May 28, 1981, is enjoined by this Court, defendants will take this action, with profound potential effects on the environment, without compliance with the requirements of NEPA and the CEQ regulations. Unless this action is declared unlawful and the defendants are so enjoined, plaintiffs and their members will suffer substantial and irreparable harm. They have no adequate remedy at law.

66. An immediate injunction prohibiting leasing of tracts 129-155 and 158-164 in the Santa Maria Basin until defendants have adequately supplemented their EIS is the only means of preserving the status quo.

FIFTH CLAIM

DEFENDANT VIOLATED THE ENDANGERED SPECIES ACT BY THEIR FAILURE TO SECURE ADEQUATE BIOLOGICAL OPINIONS

67. Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any

> action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or threatened species.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

68. Section 7(d) of the Endangered Species Act, 16 U.S.C. 1536(d), provides, in pertinent part:

> After initiation of consultation ..., the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which would have the effect of foreclosing the formulation or implementation of any reasonable or prudent alternative measures which would avoid jeopardizing the continued existence of any endangered or threatened species....

69. Neither biological opinion prepared for Lease Sale 53 was based upon an analysis of the revised estimates of the USGS of August 1980 which doubled the amount of oil thought to be present in the Santa Maria Basin. While the Fish and Wildlife Service acknowledged the existence of these new estimates, it used the EIS's risk estimates derived from the outdated figures in its opinion. As 16 U.S.C. § 1536(a)(2) requires the agency causing the biological opinion to be prepared to use the best scientific data available, consultation should have been reopened and new opinions sought upon the emergency of the new USGS figures. This has not been done and defendants have thus violated their responsibilities under § 1536(b) to obtain adequate biological opinions so as to be able to meet their obligations under § 1536(a)(2) to insure that the lease sale is not likely to jeopardize the southern sea otter, the gray whale, or other threatened or endangered species.

70. Pending completion of the new consultation required under 16 U.S.C. § 1536(a) and (b), defendants are forbidden under 16 U.S.C. § 1536(d) to make any irreversible or irretrievable commitment of resources which would foreclose the formulation or implementation of reasonable or prudent mitigation measures to avoid jeopardizing a threatened or endangered species. Sale of leases in the northern Santa Maria tracts and the ensuing pre-exploration and

exploitation activities would amount to such a commitment, in violation of § 1536(d).

71. Unless the lease sale for the northern 34 Santa Maria Basin tracts is declared unlawful and enjoined by this Court, plaintiffs and their members will suffer substantial and irreparable harm. They have no adequate remedy at law.

72. An immediate injunction prohibiting leasing of tracts 129-155 and 158-164 in the Santa Maria Basin until defendants have secured adequate biological opinions is the only means of preserving the status quo.

SIXTH CLAIM

THE LEASE SALE WILL RESULT IN AN ILLEGAL TAKING UNDER THE ENDANGERED SPECIES ACT AND THE MARINE MAMMAL PROTECTION ACT

73. 16 U.S.C. § 1538 of the Endangered Species Act makes it:

> "unlawful for any person . . . to . . .
> (B) take any[endangered] species within the United States or the territorial sea of the United States. . . ."

16 U.S.C. § 1532(13) of the act defines person to include "any officer, employee, agent, department or instrumentality of the Federal Government, [or] of any State or political subdivision thereof." 16 U.S.C. § 1532(1) defines the term "take" to mean "harass" or "harm."

74. The National Marine Fisheries Service, which enforces the application of the Act to whales, has promulgated regulations pursuant to the Act similarly providing that no person shall take any endangered species without a permit, 50 C.F.R. 222.21, and defining "take" and "person" in the same terms as the Act, 50 C.F.R. 217.12. While NMFS has not defined "harass" in a regulation, it has issued a "Notice of Interpretation" applying the term to the humpback whale in the Hawaiian Islands which includes *inter alia*, flying less than 1000 feet over a whale, bringing a vessel within 300 yards of the whale, or committing "any other act or omission that substantially disrupts the normal behavioral pattern" of the whale. 44 Fed. Reg. 1113-1114.

75. The Fish and Wildlife Service, which also has enforcement responsibilities under the Act, has defined "harass" to mean (50 C.F.R. 17.3):

> "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to breeding, feeding or sheltering."

Finally, the FWS has defined "harm" to mean (*ibid.*):

> "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effect is included within the meaning of harm."

76. The Marine Mammal Protection Act, 16 U.S.C. 1361(2), (6), provides that efforts shall be made to "protect the rookeries, mating grounds, and areas of similar significance for each species of marine animal from the adverse effects of man's actions" and that "the primary objective of their management should be to maintain the health and stability of the marine ecosystem." 1372(a)(2)(A) further provides that it is generally unlawful:

> "for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States..."

77. The regulations of the Fish and Wildlife Service, promulgated pursuant to the Marine Mammal Protection Act, generally provide that it is unlawful for any "person" to "take" any marine mammal on the high seas or on lands under the jurisdiction of the United States. 50 C.F.R. § 18.11. "Marine mammal" is defined to include sea otters. 50 C.F.R. § 18.3. They similarly define "take" as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt capture, collect, or kill any marine mammal..." *Ibid.* The National Marine Fisheries Service regulations implementing the Marine Mammal Protection Act also prohibit the taking of any marine mammal on the high seas or on lands under jurisdiction of the United States, 50 C.F.R.

216.11, including whales, porpoises, seals and sea lions, 50 C.F.R. 216.3. They define "take" in the same manner as the Fish and Wildlife Service Regulations. The Act further provides "efforts should be made to protect the rookeries, mating grounds and areas of similar significance for each species of marine mammal from the adverse effect of man's actons," 16 U.S.C. 1361(2) and that "the primary objective of their management should be to maintain the health and stability of the marine ecosystem," 16 U.S.C. 1361(6).

78. The FEIS admits that small oil spills, major oil spills, noise, vessel traffic, and other activities associated with offshore leasing, exploration, and development would cause significant harm to sea otters and perhaps to gray whales and other cetaceans. The FEIS predicts 2.29 major spills and 163 minor spills during the production phase of the sale, with over 75 percent of these originating in the Santa Maria Basin. A large spill would have the potential to destroy one third of the sea otter population. Consequently, the proposed sale will result in the harassing, harming, and taking of wildlife protected by the Endangered Species Act and the Marine Mammal Protection Act in violation of those statutes and of the regulations implementing them.

79. Unless the lease sale for the northern 34 Santa Maria Basin tracts is declared unlawful and enjoined by this Court, plaintiffs and their members will suffer substantial and irreparable harm. They have no adequate remedy at law.

80. An immediate injunction prohibiting leasing of tracts 129-155 and 158-164 in the Santa Maria Basin and an ensuing taking of threatened and endangered species in violation of the Endangered Species Act is the only means of preserving the status quo.

RELIEF

WHEREFORE, plaintiffs pray:

1. With regard to § 19 of the OCSLAA:

   (a) For a judgment declaring the Secretary's interpretation of § 19 of the OCSLAA to be erroneous and in violation of the OCSLAA and the Administrative Procedure Act; and

(b) For an order and judgment declaring that the Secretary's rejection of Governor Brown's recommendation both violated § 19 of OCSLAA and was arbitrary, capricious and an abuse of discretion; and

(c) For an order and judgment enjoining defendants both preliminarily and permanently from leasing the northern 34 tracts of the Santa Maria Basin, presently scheduled for May 28, 1981.

2. With regard to the Coastal Zone Management Act, 16 U.S.C. § 1456:

(a) For a judgment declaring that the final notice of sale (tracts selection and lease stipulations) directly affects the coastal zone and that the defendants have violated CZMA by refusing to conduct said leasing of the 34 northern tracts in the Santa Maria Basin in a manner consistent with California's Coastal Management Plan;

(b) For an order and judgment preliminarily and permanently enjoining the leasing of the 34 northern tracts of the Santa Maria Basin by defendants until such consistency determination has been conducted and there has been compliance with all attendant procedures; and

(c) For an order in the nature of a writ of mandamus compelling defendants to conduct said consistency review.

3. With regard to the National Environmental Policy Act:

(a) For a judgment declaring the failure to prepare and circulate a supplement to the environmental impact statement based upon current estimates of oil reserves in the Santa Maria Basin to be a violation of NEPA and the CEQ Regulations thereunder; and

(b) For an order and judgment enjoining defendants both preliminary and permanently from leasing the northern 34 tracts of the Santa Maria Basin until they have prepared an adequate EIS supplement.

4. With regard to the Endangered Species Act, 16 U.S.C. § 1536 et seq.:

(a) For judgment declaring the biological opinions upon which the Secretary based his finding of no likelihood of jeopardy to threatened or endangered species to be an inadequate basis for such finding for lack of consideration of the best available scientific data;

(b) For an order and judgment enjoining defendants both preliminarily and permanently from leasing the northern 34 tracts of the Santa Maria Basin until adequate biological opinions are prepared and the Secretary has properly considered those opinions as required by law; and

(c) For an order in the nature of mandamus compelling defendants to cause such biological opinions to be prepared.

5. With regard to the Endangered Species Act and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 et seq.:

(a) For a judgment declaring that the sale of leases for the northern 34 tracts of the Santa Maria Basin scheduled for May 28, 1981, would constitute an illegal taking of threatened and endangered wildlife; and

(b) For an order and judgment enjoining defendants both preliminarily and permanently from leasing the northern 34 tracts.

6. For costs of suit herein.

7. For such other and further relief as the Court may deem just and proper.

Dated: APRIL 29, 1981

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Dear Sirs:

I am responding to the letter dated March 23, 1979, addressed to Assistant Attorney General Harmon from the Acting General Counsel of the Department of Commerce and the Deputy Solicitor of the Department of the Interior requesting the opinion of the Department of Justice on the question whether the pre-leasing activities of the Secretary of the Interior relating to the Outer Continental Shelf[1] are subject to the consistency requirement of § 307(c)(1) of the Coastal Zone Management Act, 86 Stat. 1285, 16 U.S.C. § 1456(c)(1). Section 307(c)(1) provides:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the

[1] According to the papers submitted to us, the pre-leasing activities of the Secretary of the Interior include steps such as: calls for nominations (ascertainment of tracts which the industry would like to see offered for lease, and which other parties believe should not be leased); tract selection; the various steps involved in the preparation of an Environmental Impact Statement; consultation with the Governors; individual tract selection.

maximum extent practicable, consistent with approved state management programs.

Mr. Hamon has asked me to respond.

The Department of the Interior takes the position that its pre-leasing activities relating to the Outer Continental Shelf Lands do not *directly* affect the Coastal Zone, and that, in any event, the applicability, if any, of § 307(c)(1) to those activities has been abrogated by the Coastal Zone Management Act Amendments of 1976 and the Outer Continental Shelf Land Act Amendments of 1978. The Department of Commerce disagrees with both positions. In its view the statutory language "directly affecting the coastal zone" must be read as "significantly affecting the coastal zone", and the significance of the activities in question must be considered in terms of "primary, secondary, and cumulative effects" on the Coastal Zone. It also asserts that the two amendatory acts have no bearing on the scope of § 307(c)(1).

We have examined the materials submitted with the request as well as the complex pertinent legislative histories to the extent possible within your time limitations. We conclude (1) that neither the Coastal Zone Management Act Amendments of 1976 nor the Outer Continental Shelf Lands Act Amendments of 1978 affect the application of § 307(c)(1) to Outer Continental Shelf Land pre-leasing activities, (2) that § 307(c)(1) applies only to activities directly affecting the Coastal Zone, and (3) finally that this Department is not authorized to resolve the essentially factual question whether and to what extent any of the pre-leasing activities of the Department of the Interior under the Outer Continental Shelf Lands Act directly affect the Coastal Zone.

I.

The Coastal Zone Management Act, 16 U.S.C. § 1451 et seq., is primarily concerned with the effective management, beneficial use, production, and development of the Coastal Zone. Section 302(a), 16 U.S.C. § 1451(a). The Coastal Zone extends seaward to the outer limit of the United States territorial sea, inland to the shore line and to

a limited extent to the adjacent shore lands. Section 304(1), 16 U.S.C. § 1453(1).[2] The Act is administered by the Secretary of Commerce. Section 304(15), 16 U.S.C. § 1453(15). For purposes pertinent here the Act provides for the development and administration by the States of state management programs for the Coastal Zone. Those programs require the approval of the Secretary of Commerce. Sections 305, 306, 16 U.S.C. §§ 1454, 1455.

The Outer Continental Shelf Lands Act of 1953, as amended, provides that the Secretary of the Interior shall administer the federal program of oil and gas leasing on the Outer Continental Shelf. Sections 5 and 6, 43 U.S.C. §§ 1334, 1335. The Outer Continental Shelf consists generally of the submerged lands lying seaward of the Coastal Zone of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. Section 2(a), 43 U.S.C. § 1331(a).

The basic dispute underlying your inquiry is whether and to what extent the pre-leasing activities of the Secretary of the Interior under the Outer Continental Shelf Lands Act are subject to the provisions of § 307(c)(1) of the Coastal Zone Management Act.

A. The Coastal Zone Management Act Amendments of 1976.

Section 6 of the Coastal Zone Management Act Amendments of 1976 added to § 307(c)(3) a new paragraph (b).[3]

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[2] Section 2(e) of the Outer Continental Shelf Lands Act, as added by § 201(b) of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp.) § 1331(e) uses the same definition.

[3] Section 307(c)(3)(B), as amended by the Outer Continental Shelf Lands Act Amendment of 1978 § 504 provides:

> (B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and

The Department of the Interior contends that this paragraph is intended to constitute the exclusive method by which, and the only stage at which, the consistency of all aspects of the Outer Continental Shelf Lands leasing process—including pre-leasing activities—with the state management programs is to be determined and that the new paragraph pro tanto supersedes the consistency require-

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will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security. If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

ment of § 307(c)(1). We cannot concur in that interpretation of the 1976 Amendment.

The enactment of § 307(c)(3)(B) originated from a dispute between the Department of the Interior and the Department of Commerce concerning the proper interpretation of § 307(c)(3), now § 307(c)(3)(A).[4] That paragraph provides for the purposes relevant here that, after a state's management program has been approved by the Secretary of Commerce, an applicant for a Federal permit or license for an activity affecting the Coastal Zone must include in the application a certification that the proposed activity complies with the state's program, and that the activity will be conducted in accord with that program.[5] The Department of

[4] Section 307(c)(3)(A) provides:

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

[5] The state concurrence in the certification is presumed if it fails to object within six months after receipt of a copy of the applicants' certification. The permit or license may not issue unless the State concurs in the certification or is presumed to have concurred, or unless the

the Interior contended that leases in the Outer Continental Shelf did not come within the purview of the provision; the Department of Commerce took the opposite position.

The dispute came to the attention of Congress during its consideration of the Coastal Zone Act Amendments of 1976. Both legislative committees concluded that § 307(c)(3) is intended, and indeed always was intended to cover leases, and reported out bills amending § 307(c)(3) by adding the word "lease" to the words "license or permit" already included in the paragraph. S. Rept. 94-277, pp. 19, 36-37, 53, 59; H. Rept. 94-878, pp. 4, 52, 67-68, 48.

The Senate agreed with the committee report. The bill passed by it amended § 307(c)(3) to include the word "lease". 121 Cong. Rec. 23050, 23086.[6] When the bill reached the floor of the House it contained the same provision. 122 Cong. Rec. 6124. The amendment of § 307(c)(3), however, was stricken on motion of Congressman duPont, because he felt, on the basis of testimony received from the Administration and the industry, that more time was needed to evaluate the full impact of the proposed amendment. He continued:

> "By striking it in the House bill and leaving it in the bill that has already passed the Senate we will be giving ourselves a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would be more beneficial and at the same time protect the rights of the States.
>
> So the purpose of this amendment is not to get rid of the word "lease" but to allow us time to work on the problem a little bit longer." 122 Cong. Rec. 6128.

Congressman Murphy, who was in charge of the legislation in the House, accepted the amendment, pointing out that even if an applicant were granted a lease the statute required permits and licenses to be subject to the consist-

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Secretary of Commerce finds that the activity is consistent with the objectives of the Act or otherwise necessary in the interest of national security.

[6] See also the explanation of the provision by Senator Hollings who was in charge of the legislation. 121 Cong. Rec. 23053.

ency requirement of § 307(c)(3). Ibid. This observation appears to have been related to the position taken by the Department of the Interior warning of the interminable delays that would result if every lease and every related permit and license was to be subject to the procedures of § 307(c)(3), a matter that could bring about repeated delays of six months. See the letter from Secretary Kleppe of the Department of the Interior to the Director, Office of Management and Budget, dated May 24, 1976.

The conference report adopted by both Houses provided that § 307(c)(3) should be split up. The original paragraph became § 307(c)(3)(A), and the committee added a new paragraph (B). See, *supra*, fn. 3. The import of the new paragraph is that an individual or organization submitting to the Secretary of Interior a plan for the exploration, development of, or production from, an area leased under the Continental Shelf Lands Act, must submit a certification similar to the one required under paragraph (A). If the State agrees to the certification or does not object within six months, or if the Secretary of Commerce makes a finding of consistency, subsequent requests for permits or licenses required for activities described in detail in such plan will not have to go through the conformity procedures provided for in paragraph (A).

The Conference Report contains the following explanation of the amendment:

> Also, under the substitute, any subsequent OCS [Outer Continental Shelf] Federal license or permit required for activities specified in any exploration, development, and production plan are presumed to be consistent once the plan is certified as being so consistent. This important change will significantly expedite OCS oil and gas development. Under present Department of Interior regulations, Federal permits are required for a large number of individual activities including geophysical exploration or production, pipeline right-of-way, structure placement, waste discharge, and dredging and filling operations. Thus, separate consistency determinations on each activity, described in detail in an exploration, development or prouction

> plan, will not be necessary. H. Rept. 94-1298, pp. 30-31.

The explanation of the Conference Report on the floor of the Senate by Senator Hollings contained the following pertinent observation:

> Third, a new incentive for expediting determination of whether particular off-shore energy activity is consistent with a coastal State's approved management program, on an overall plan basis rather than on an individual license/permit by license/permit basis; * * *. 122 Cong. Rec. 21230.

* * *

The amendment was thus designed to overcome the difficulties adverted to by Secretary Kleppe, namely, that a new conformity review under § 307(c)(3), involving a six-month delay, would be required every time the lessee of Outer Continental Shelf Lands had to apply for a new license or permit.

The Department of the Interior appears to believe that paragraph (B) embodies an exclusive provision concerning the consistency requirement of the Outer Continental Shelf Lands leasing process with Coastal Zone state management plans and that it therefore supersedes § 307(c)(1) with respect to the entire process, including the preleasing stage. It thus relies on the doctrine of repeal by implication. The Supreme Court, however, has consistently applied the rule that repeals by implication are not favored; that the intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statutes involved; and that a repeal by implication will be found only where there is a "positive repugnancy" between the statutes in question. *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974); *Borden* v. *United States* 308 U.S. 188, 198-199 (1939).

In our view the relationship between §307(c)(1) and 307(c)(3)(B) does not meet these rigorous standards, at least not for the pre-leasing period.[7] The two provisions can

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[7] We need not examine the question, not presented by your inquiry, whether once a plan for the exploration, or development, or production envisaged by § 307(c)(3)(B) has been filed, that paragraph becomes the

readily coexist during that period and there is no "positive repugnancy". There is nothing explicit or implied in the 1976 Amendments to the effect that the procedure set forth in § 307(c)(3)(B) provides the only consistency requirement for the entire Outer Continental Shelf Land leasing process. Paragraph (B) is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or production plan. Under § 307(c)(3)(B) there will be a single consistency review following the submission of the plan by the lessee, and that review will cover any future activities described in detail in the plan. Section 307(c)(3)(B) thus simplifies the regulatory process during the post-leasing period. It has no bearing on the consistency requirements antedating that stage of the leasing process. It is well possible that some of the pre-leasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late. It is our opinion that with respect to pre-leasing activities § 307(c)(1) and § 307(c)(3)(B) can both be given effect and accordingly that the enactment of § 307(c)(3)(B) does not disclose any clear and manifest legislative intent to supersede, and does not supersede, the applicability of § 307(c)(1) to those pre-leasing activities of the Secretary of the Interior relating to the Outer Continental Shelf Lands which come within the scope of that section.

B. The Outer Continental Shelf Act Amendments of 1978.

The second statute which in the view of the Department of the Interior supersedes § 307(c)(1) regarding leases is the Outer Continental Shelf Land Amendments Act of 1978. Section 208 of that Act adds to the Outer Continental Shelf Lands Act of 1953 a number of new sections con-

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exclusive procedure for the determination of the consistency requirement, covering both the Department of the Interior and the lessee, or whether the Department of the Interior remains subject to the additional consistency requirement of § 307(c)(1).

taining specific procedures for the Outer Continental Shelf Lands leasing program. Some of those provisions are expressly adjusted to the Coastal Zone Management Act. (See especially the repeated references to §§ 306 and 307(c)(3)(B) of the Coastal Zone Management Act in § 25 of the Outer Continental Shelf Lands Act added by the 1978 Amendments, 43 U.S.C. (Supp.) § 1351.)

The most significant apparent conflict between the 1978 Amendments and § 307(c)(1) appears in § 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. (Supp.) § 1343, entitled "Coordination and Consultation with Affected State and Local Government." Pursuant to § 19(c) the Governor of a State, or the executive of an affected local government, may submit to the Secretary of the Interior recommendations regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development or production plan. It provides that the Secretary of the Interior shall accept those recommendations unless he decides that they do not provide for a reasonable balance between the national interest [in increasing oil production] and the well-being of the citizens of the affected State. The pertinent committee reports say that no "State should have a veto power over OCS [Outer Continental Shelf] oil and gas activities." S. Rept. 95-284, p. 78; H. Rept. 95-590, p. 153.

Under oridinary circumstances we might be inclined to find a clear legislative intent to the effect that the recommendations referred to in § 19(c) were designed to take the place of the conformity requirement of § 307(c)(1) of the Coastal Zone Management Act. The language and legislative history of the 1978 Amendments, however, refute any such intent.

Section 608(a) of the 1978 Amendments provides expressly that:

> Except as otherwise expressly provided in this Act, nothing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972...

More specifically, the section-by-section analysis of § 19 in the House Report contains the following footnote expressly disclaiming any Congressional intent to modify by

implication the consistency requirements of the Coastal Zone Management Act:

> "The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), certain OCS [Outer Continental Shelf] activities including lease sales and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments,[8] nothing in this Act is intended to amend modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan." H. Rept. 5-590, p. 153, fn. 52.

We therefore conclude that neither the Coastal Zone Management Act Amendments of 1976 nor the Outer Continental Shelf Lands Act Amendments of 1978 affect the application of the consistency requirement of § 307(c)(1) of the Coastal Zone Management Act to the pre-leasing activities of the Department of the Interior.

II.

Having determined that the pre-leasing activities of the Secretary of the Interior are subject to the conformity requirements of § 307(c)(1) of the Coastal Zone Management Act, we now reach the second question posed in the submission. The Department of the Interior contends that, if § 307(c)(1) applies at all to its pre-leasing activities, it applies only to those activities which, according to the plain statutory language of the paragraph, directly affect the Coastal Zone.

The implementing regulations issued by the Department of Commerce in 1978, however, substitute the term "significantly" for the statutory word "directly" and define 'significantly" in terms of "primary, secondary, and cumulative

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[8] The House Report was submitted in 1977. Title V of the 1978 Amendments contains express amendments to the Coastal Zone Management Act. Section 504 modifies § 307(c)(3)(B)(ii).

effects". 15 CFR §§ 930.30, 43 Fed. Reg. 10518-10519. The department explains its departure from the statutory language on the ground that, while the various provisions relating to the consistency requirement are not uniform in language, the legislative history is "replete" with statements that Congress intended to cover all Federal activities capable of significantly affecting the Coastal Zone. See 43 Fed. Reg. 10511. In our view the legislative history does not justify this departure.

Prior to the conference, the text of § 307(c)(1), as passed by both Houses of Congress, subjected all federal activities in the Coastal Zone to the consistency requirement. Senate: 118 Cong. Rec. 14190 (§ 314(b)(1)), House: 118 Cong. Rec. 26502. (§ 307(c)(1)). The Conference Committee changed federal activities "in the Coastal Zone" to the present statutory language of "directly affecting the Coastal Zone." The Explanatory Statement in the Conference Report does not explain why the Committee departed from the language common to the bill as it had passed both Houses.[9] The statement, however, indicates a full awareness that the different paragraphs of § 307(c) applied different standards of Federal impact on the Coastal Zone: § 307(c)(1) "directly affecting"; § 307(c)(2) "in the Coastal Zone"[10]; § 307(c)(3) "similar consideration".

In view of this history of the words "directly affecting" we are unable to concur in an interpretation that would dilute "directly" first to "significantly" and then to "primarily, secondarily, and cumulatively."

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[9] They (the conferees) also agreed that as to Federal agencies involved in any activities directly affecting the State coastal zone and any Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved State management programs. In addition, *similar consideration* of State management programs must be given in the process of issuing Federal licenses or permits for activities affecting State coastal zones. H. (Conf.) Rept. 92-1544, p. 14. (Emphasis applied.)

[10] The regulations issued by the Department of Commerce extend the "significantly affect" tests even to § 307(c)(2) which in terms applies only to activities "in the Coastal Zone".

Finally, in our discussion of the question of repeal by implication we have pointed out that § 307(c)(1) and § 307(c)(3)(B) are separate provisions dealing with different stages of the leasing process. We have concluded that the provision concerning the post-leasing process does not necessarily repeal a provision addressed to the pre-leasing stage. Similarly when the statute provides for different impact requirements at different stages of the leasing process, there is no need, and indeed no justification, for an attempt to obliterate those express statutory differences by regulation. It is our opinion that the conformity requirement of §307(c)(1) applies only to the pre-leasing activities of the Department of Interior directly affecting the Coastal Zone. The question whether those activities or any of them directly affect the Coastal Zone is essentially one of fact which the Department of Justice is not authorized to answer. See 28 Op. A.G. 218, 222 (1910); 39 Op. A.G. 425, 428 (1940).

Sincerely,

/s/

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Rockville, Maryland 20852

March 23, 1979

MEMORANDUM TO: Record
GC—Eldon V.C. Greenberg
FROM: Application of CZMA Section 307(c)(1) Consistency Requirement
SUBJECT: to Interior's OCS Pre-Lease Sale Activities

BACKGROUND

A. The Coastal Zone Management Act of 1972

Under section 307(c)(1) of the Coastal Zone Management Act as originally enacted in 1972 (16 U.S.C. 1451, *et seq.*, CZMA), all federal agencies conducting activities significantly affecting the coastal zone were required to ensure that their activities be conducted in a manner "to the maximum extent practicable, consistent" with state coastal management programs approved under the CZMA. The federal agency was responsible for making a consistency determination and, in the event of a serious disagreement with such a determination by a state, voluntary mediation by the Secretary of Commerce, in cooperation with the Executive Office of the President, was available. This section applied to all federal activities and thus included the Department of the Interior's Outer Continental Shelf (OCS) pre-lease sale activities, such as tract selection and choice of lease stipulations.

In addition to this general, all-inclusive provision, special procedures were included in section 307(c)(3) of the CZMA, as originally enacted, for federal license and permit activities significantly affecting the coastal zone. All such activities had to be certified by an applicant as consistent with a state's approved coastal management program. This section applied to all license and permit activities and thus applied

to Interior's and other agencies' OCS license and permit activities.

B. The 1976 Amendments

In the 1976 amendments to the CZMA, Congress supplemented these provisions with an addition to section 307(c)(3) that required consistency compliance, through use of the certification procedure, for federally permitted activities after the issuance of an OCS lease (e.g., platform placement, drilling), which activities were described in OCS exploration and development/production plans. States with federally approved coastal management programs were to review OCS plans to determine whether permit actions in such plans, if significantly affecting their coastal zone, were consistent with the requirements of the coastal program. Federal agencies were prohibited from issuing OCS permits which a state found to be inconsistent with its coastal program unless the Commerce Secretary, following an appeal by the OCS lessee, overrode the state's objection.

A question was raised by the Department of the Interior as to whether, as a result of the passage of this new provision, designated section 307(c)(3)(B), Interior's OCS pre-lease sale activities were exempted from the general federal activity consistency requirement of section 307(c)(1). Commerce objected to Interior's claim of exemption. This disagreement continued up to, and now after, passage of the Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372, OCSLAA).

QUESTION

The original CZMA applied to all federal activities or permitted actions. The question is therefore whether either the 1976 amendments to the CZMA or the OCSLAA exempt the Department of the Interior from the general, otherwise all-inclusive, federal consistency requirement of section 307(c)(1) of the CZMA.

CONCLUSION

Neither the CZMA, as originally enacted or as amended, nor the OCSLAA specifically exempt any federal activity

from consistency requirements. Rather, the only relevant statutory language—307(c)(1)—specifically includes all such activities in a consistency obligation. An analysis of the legislative history of the CZMA, as amended, and the OCSLAA does not reveal that Congress intended any unique exemption for Interior's OCS pre-lease sale activities.

DISCUSSION

The federal consistency requirements of the CZMA, as amended, are set forth in sections 307(c) and (d). (See Attachment I). Although the statutory provisions are set forth in five subsections, they can be divided into two primary categories: requirements on federal agencies, with respect to activities they conduct directly or support through official action, (sections 307 (c)(1) and (2)), and requirements on private applicants for federal licenses, permits or assistance (sections 307(c)(3)(A), (c)(3)(B) and (d)). As indicated in Department of Commerce final federal consistency regulations, sections 307(c)(1) and (2) encompass all federal actions other than federal license, permit and assistance activities. This includes the acquisition, utilization or disposal of land or water resources, and the adoption of formal proposals which guide or prescribe alternative uses of federal resources. See 15 CFR §930.31, 43 Fed. Reg. 10519, March 13, 1978. The Department of the Interior's OCS pre-lease sale activities fall within this area. See Steps 1-12 in Attachment II.

A Federal activity is covered by the consistency requirement if it is capable of significantly affecting a state's coastal zone. Thus, federal activities need not be situated within the boundaries of the coastal zone in order for the requirements to apply. See 15 CFR §923.33, 43 F.R. 8405, March 1, 1978. It is sufficient if they generate significant effects within the coastal zone, and primary, secondary and cumulative effects must be considered. See 15 CFR §920.21, 43 Fed. Reg. 10519, March 13, 1978.

Interior's actual pre-lease sale decisions and OCS program modification proposals confirm the relationship of OCS leasing activities to coastal zone management. In re-

cent OCS lease sales, Interior has imposed pollution control stipulations to mitigate impacts along the coastline which could be caused by the washing ashore of oil, fuel, chemical residues and toxic substances. In addition, Interior has deleted geologically hazardous lease tracts to avoid damage to rigs or pipelines which could lead to adverse impacts on coastal resources. In its September 30, 1977 proposal for "An Intergovernmental Coordinated Planning Process for the Leasing and Transportation of OCS Oil and Gas," Interior recommended the review of state coastal zone management policies to ensure that tract selection and lease stipulation decisions adequately addressed issues concerning environmental quality, use conflicts, potential hazards to pipe laying, unique resource areas and potentially affected recreation areas. Interior concluded that if the proposal were implemented, "Consistency with State coastal zone management plans would be assured." See Report at 17-18.

Except for section 307(c)(3)(B), pertaining specifically to OCS exploration and development/production plans, nothing in the 1976 CZMA amendments changed the consistency requirements of the original statute. It is an elementary principle of statutory construction that, in the absence of a clear and manifest intent to the contrary, subsequent Congressional action does not affect pre-existing statutory requirements. Therefore, there is no basis on the plain reading of the statute to exempt any federal actions, including OCS pre-lease sale activities, from the general, all-inclusive requirements of consistency provided in the original statute.

In order to determine if Congress at that time intended to modify any of Interior's consistency responsibilities, one must, of course, also look to the legislative history.

This history indicates that some members of Congress interpreted section 307(c)(3), which applied to federal license and permit applications, to include the submission of OCS lease bids. They codified this interpretation when committees of both Houses of Congress reported separate versions of amendments to the CZMA in the 94th Congress with the inclusion of the word "lease" with "license or permit" in 307(c)(3). S. 586, Sec. 102(12) (94th Cong. 2nd Sess.); H.R.

3981, Sec. 2 (15) (94th Cong. 2nd Sess.) This intent so to codify was confirmed in the committee reports. See Senate Report No. 94-277 at 19 and 36, and House Report No. 94-878 at 52.

However, on the House floor, in response to comments from sources such as Interior Department testimony, the word "lease" was deleted from the House bill. This was not to remove leasing from the requirements of section 307(c)(3), but merely to retain flexibility for full consideration of the issue in the Conference Committee. See 122 Cong. Rec. 1854-55 (March 11, 1976).

The Conference Committee essentially selected the House version, which did not expressly include "lease" as an included 307(c)(3) "license or permit." However, the Conference Committee Report assumed continued application of section 307(c)(3) federal consistency to the issuance of individual OCS leases:

> The conference substitute follows the Senate bill in amending the federal consistency requirement to section 307(c)(3) of the Coastal Zone Management Act of 1972. The Senate bill required that each Federal lease (for example, offshore oil and gas leases) had to be submitted to each state with an approved coastal zone management program for a determination by that state as to whether or not the lease was consistent with its program. House Report No. 94-1298 at 30.

The Conference Committee then divided section 307(c)(3) into two parts. Section 307(c)(3)(A) constituted the original section 307(c)(3), providing for a state consistency certification review of federal licenses and permits. Section 307(c)(3)(B) provided for a separate coordinated and consolidated state consistency certification review of all licenses and permits described in OCS exploration and development/production plans. The intent of this change was to accelerate offshore operations and reduce burdens on the *energy industry*, by eliminating state certification review under 307(c)(3) for each industry lease bid as well as for each separate, subsequent federal license and permit described in OCS plans. See Steps 13, 15 and 17 in Attachment II. Congress rather called for two industry consistency certifications at the OCS exploration and develop-

ment/production plan stages. See Steps 14 and 16 in Attachment II. See also House Report No. 94-1298 at 30-31. These changes were responsive to the Department of the Interior's expressions of concern that the proper time for "certification" by "lease applicants" should occur at the OCS plan phase. Hearings on Coastal Zone Management before the Subcommittee on Oceanography of the House Committee on Merchant Marine Fisheries, 94th Cong., 1st Sess. 187-8, 204 (1975). Neither the Administration nor the Congress considered the question of exempting the Interior Department from its OCS pre-lease sale consistency obligations under section 307(c)(1).

Comments by committee conferees and staff members at the Conference on the 1976 amendments continued the discussion of subsections 307(c)(3)(A) and (B) and the issuance of individual OCS leases. Transcript at 21, 22 and 29. Here, as during the earlier consideration by the Conference Committee, section 307(c)(1) was never addressed.

Interior argues that the apparent Congressional intent in creating a new section 307(c)(3)(B) of the CZMA was to exclude state certification review of individual industry bids and applications for a lease from section 307(c)(3). Commerce does not question that interpretation despite the ambiguous legislative history. The unclear nature of the legislative history was aptly demonstrated in the case of *New York* v. *Kleppe*, which was being litigated at the time of passage of the 1976 Amendments to the CZMA. In response to the District Court Judge's request for supplemental briefs on the impact of the 1976 CZMA Amendments, the Natural Resources Defense Council argued that Congress intended to treat leases in the same manner as licenses and permits. Interior objected and argued, through the Justice Department, that the appropriate time for imposing the (c)(3) procedures was after issuance of a lease when the lessee is ready to begin OCS operations. The Department of Justice did *not* argue that (c)(1) was inapplicable to the lease sale process. Rather, the Department's brief stated that consistency did not apply to the physical act of granting a lease. See Step 13 in Attachment II. NOAA concurs with this statement. Consistency under

(c)(3) does not apply to an industry request for and receipt of a lease, but rather (c)(1) applies to Interior's tract selection and lease stipulation decisions. The District Court Judge, in dictum, declared that OCS leases were subject to the licenses and permit requirements of (c)(3). *New York* v. *Kleppe*, D.C.E.D. N.Y., August 13, 1976, 9 ERC 1769, reversed on other grounds. The holding demonstrates that the Court was solely concerned with the application of (c)(3) to the leasing process.

Interior extrapolates the conclusion that Congress in the 1976 amendments to the CZMA repealed Interior's general responsibilities under section 307(c)(1). The Congressional intent behind the 1976 consistency amendment was to relieve industry's burden for compliance, and not to remove Interior's responsibility to comply with section 307(c)(1) during exercise of its OCS pre-lease sale activities. The plain words of the statute obviously do not support Interior's position. In fact, Interior itself concedes that there is *no* legislative support for such a position. As stated by the Solicitor's Office,

> Unfortunately, in light of the credible arguments which can be made either way, the legislative history of the 1976 amendment to the CZMA does not aid in determining whether leasing is subject to (c)(1). In fact, the question of (c)(1) applicability to leasing was nowhere discussed. Memo dated May 6, 1977, to the Interior Acting Assistant Secretary for Policy, Budget and Administration from the Acting Deputy Solicitor—p. 8.

Thus, as a matter of statutory interpretation and as a matter of logical extrapolation, there is no basis to support a contention that the plain meaning of 307(c)(1) must be disregarded. The amendment to section 307(c)(3) did not relieve Interior from its continuous responsibilities under section 307(c)(1), as originally promulgated and never changed, to undertake its OCS pre-lease sale activities in a manner consistent, to the maximum extent practicable, with approved coastal management programs.

Interior also argues that changes in a separate, although related, OCS statute, the OCSLAA, override the plain meaning of 307(c)(1). Several sections of the OCSLAA re-

late primarily to consideration of the interests of coastal states.

—New sections 11 and 25 deal with OCS exploration plans and development/production plans, respectively. Among other provisions, they essentially incorporate the language of the federal consistency provisions of section 307(c)(3)(B) of the CZMA, pertaining to federal licenses or permits for activities described in detail in such plans. In addition, section 25 provides for disapproval of a plan when activities described are not consistent with an approved state coastal management program.

—New section 18 requires Interior to prepare a five year OCS leasing program. It includes a requirement for consideration of laws, goals, and policies of affected states, and requires Interior to consider suggestions of affected states on such leasing program, and to indicate to the President why any specific recommendation of a state was not accepted. It also requires Interior as part of its leasing program to establish procedures for, among other things, consideration of the coastal zone management program being developed or administered by an affected coastal state pursuant to the CZMA. Such procedures were to be consistent with and improve upon, the existing procedures.

—New section 19 authorizes any affected state to submit recommendations to Interior regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development/production plan. It requires Interior to accept recommendations of an affected state if they provide for a reasonable balance between the national interest (based on the desirability of obtaining oil and gas supplies in a balanced manner) and the well-being of the citizens of the affected state.

—Finally, section 504 of the OCSLAA amends section 307(c)(3)(B) of the CZMA itself to modify the period for state concurrence with OCS plans for federal consistency purposes.

At the OMB "quality of life review" which took place during promulgation of the Federal consistency regulations, NOAA and Interior committed themselves to work with

the Congress during its consideration of the OCSLAA in order to address Interior's claim for an exemption. In January 1978, both agencies submitted to OMB opposing amendments to provide explicit language on this issue within the OCSLAA. OMB developed a decision document for Presidential review. Wishing to avoid conflicts and further controversy on the entire OCSLAA and particularly on proposed CZMA amendments which related to OCS revenue sharing with states, the President decided to withhold submission of an Administration amendment on the issue. Notwithstanding Administration inaction, Congress thereafter reaffirmed its intent to apply (c)(1) consistency to Interior's OCS pre-lease sale activities.

The House OCS Committee, whose version of the amendments formed the basis for Public Law 95-372, was explicit that there was no intent to change or alter the existing CZMA consistency applications or procedures except where specifically so stated:

> Except for specific changes made by Titles IV and V of the 1977 Amendments [Title IV was to amend section 308 of the CZMA, and Title V included a provision to reduce the time period for state concurrence with OCS plans under section 307(c)(3)(B)], nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. *Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan.* (emphasis supplied) House Report No. 95-590 at 153, footnote.

As to the section 19 "state recommendation" procedure, no attempt was made to change the existing CZMA procedures. Section 19 was conceived as an additional protection for states. Originally drafted and promoted as a veto, it later became a "preference" or "presumption" provision. States' recommendations as to timing, location and siting of lease sales were to be accepted "unless...." Under the CZMA, state recommendations are not a prerequisite. Specific activities must be reviewed under 307(c)(1) and consistency "to the maximum extent practicable" assured. Specifically, the House Committee, whose version of section 19

was accepted by the Senate, and thus made part of the OCSLAA, stated:

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce.... [N]othing is intended to alter procedures under that Act for consistency. (emphais supplied) *ibid.*

Other references in the legislative history to coastal management programs reaffirm the clear Congressional intent not to make changes other than those specifically listed, but rather to support and build upon existing CZMA policies, programs, and consistency requirements. See Conference Report, House Report No. 95-1474 at 181 (§11); see Senate Report No. 95-284 at 77; House Report No. 95-590 at 151, 152 and Conference Report, House Report No. 95-1474 at 103, 105 (§18). See Senate Report No. 95-284 at 93, 84; House Report No. 95-590 at 167, 168; and Conference Report, House Report No. 95-1474 at 117, 118, 199 (§25).

Interior argues again, despite clear legislative language and history, that there is "repeal by implication." Interior's reasoning is that Congress knew of the disagreement between Commerce and Interior regarding the applicability of 307(c)(1) to Interior's OCS pre-lease sale activities, and yet specifically elected not to provide for explicit application of the 307(c)(1) requirement.

This argument contradicts the plain language and legislative history which supports application of 307(c)(1). Rather than repeal by implication, there is application by reconfirmation. The logical fallacy of Interior's argument is its assumption that Congress' refusal specifically to restate what was already the law constitutes acceptance of a change, which it specifically rejected. Despite the clear opportunity, Congress refrained from establishing any exception within section 307(c)(1) for Interior's OCS pre-lease sale activities. More importantly, as part of the OCSLAA Congress did, in fact, amend section 307(c)(3)(B), the very source of Interior's argument, and was again silent on the

disagreement. It could have had no better nor more appropriate opportunity to uphold Interior's claim of exemption. Interior's argument is that Congressional failure to act in the face of notice of the disagreement signifies acceptance of Interior's position. However, all tenets of statutory construction maintain that Congressional inaction demonstrates support for the continued application of the section 307(c)(1) requirement to Interior's OCS pre-lease sale activities. Those proposing an exception to the broad language of the consistency requirement have the burden of supporting that exemption, and it is not only not met but, in fact, has been outweighed by the plain words and history of the provision. Even if we assume that the statutory language and legislative history do not mandate application of 307(c)(1) to OCS lease-related activities, legislative inaction is ordinarily not an adoption or ratification by the legislature of a particular interpretation of an existing statute. Only when an interpretation has been applied consistently over a period of time by the officer or agency responsible for the statute's implementation, or by the courts, will such an interpretation be considered, and then with great hesitance. See e.g., *Kay* v. *FCC*, 433 F. 2d 638 (D.C. Cir. 1970); 2A Sutherland, Statutory Construction, 4th ed., at 261-65 (1973).

> "True, long-standing administrative interpretation of a statute, acquiesced in by all interested parties, may form the basis for an inference that the administrative interpretation is correct. However, courts are properly chary of equating mere inaction with approval in the absence of a solid foundation for the inference of conscious ratification."

Duncan v. *Railroad Retirement Board*, 375 F. 2d 915 (4th Cir. 1967).

There is here no longstanding consistent administrative interpretation of the statutory provisions in issue supportive of Interior's interpretation. Rather, the agency responsible for implementation of the CZMA, NOAA, has in fact pointedly continued to assert the clear applicability of the statutory language. There is absolutely no legal basis for reliance upon Congressional inaction as an aid to the

construction of section 307(c). *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y. 2d 84, 359 N.E. 2d 393 (1976).

> "If the failure of enactment of every amendment offered for the consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless."

United States v. *Guerlain, Inc.*, 155 F. Supp. 77 (SDNY 1957).

Thus, the rules of statutory construction are supportive of the application of section 307(c)(1). Yet, it is unnecessary even to devote time to considering them at length, in light of the evident intent of Congress.

POLICY CONSIDERATIONS

It is also clear that the policies of the CZMA would be furthered by the application of section 307(c)(1) to Interior's OCS tract selection and lease stipulation decisions significantly affecting the coastal zone. Policy considerations include the following:

—The purpose of the federal consistency provisions is to provide added benefits to those coastal states that have expended a substantial effort to develop coastal programs which address national as well as state and local concerns. States with approved programs are provided with both mandatory CZMA consistency authority and discretionary OCS Lands Act (§19) gubernatorial recommendations for OCS development/production plans, and are equally entitled to dual benefits at the critical OCS lease sale stage. States are likely to question the utility of the federal CZM program if OCS leasing decisions are totally exempted from the consistency requirements.

—Application of 307(c)(1) would promote intergovernmental coordination at the earliest practicable time. Interior makes important decisions, which could significantly affect coastal states, at the OCS pre-lease sale stage. Pursuant to 307(c)(1), during the environmental impact statement process which precedes each OCS lease sale, or during other appropriate agency procedures, Interior would examine state coastal program

requirements related to pipeline corridors, areas of critical concern, water and air quality, recreation sites, marine habitat, etc., and then would select tracts and impose lease stipulations in a manner which allows energy development while conforming to coastal program requirements. Interior studies indicate that implementation of such measures at the OCS lease sale stage would minimize adverse coastal environmental and socio-economic impacts, thereby reducing conflicts with affected states.

—Application of 307(c)(1) calls for a process with built-in safeguards. As a condition of federal approval for a state's coastal program, the state must demonstrate adequate consideration of the national interest in planning for and siting of major energy facilities, including those related to OCS exploration and development. No coastal program has been approved except after critical review by affected federal agencies, *including* Interior. After federal approval, Interior's tract selection and lease stipulation decisions need only be consistent, "to the maximum extent practicable," with state programs, and any serious disagreement is subject to mediation by the Commerce Secretary in cooperation with the Executive Office of the President. Arbitrary or illegal state action could lead to federal termination of program approval and cessation of state consistency authority and, also, loss of federal monies under the Coastal Energy Impact Program. Thus, a special exemption for Interior is not warranted since the consistency privilege is exercised within a framework which shields against abusive state action.

—Failure to apply consistency to OCS tract selection and lease stipulation decisions would undoubtedly lead to conflicts with coastal states. The absence of a mandatory intergovernmental coordination process at this stage has been the primary cause of numerous state lawsuits against Interior resulting in serious delays to offshore leasing. Previous Administrations were grievously unresponsive to state recommendations concerning OCS lease sales with indifference usually justified by the position that the national interest in energy development warranted disregard for coastal concerns. If consistency is not applied at the lease sale stage,

substantial time and money will be wasted as states object, at the exploration and development/production phases, to OCS activity occurring in tracts, or subject to lease stipulations, which prove to be inconsistent with approved coastal programs. The issue was raised by Massachusetts in litigation concerning Interior's Georges Bank OCS lease sale. California is now seeking disposition of the issue prior to Interior's OCS lease sale off Southern California scheduled for June 1979, and has argued that "it is essential to us that leases be consistent with our coastal management program." Letter from the California Coastal Commission to the President, December 5, 1978. Agreement or conflict resolution at the lease sale stage will necessarily reduce friction and potential litigation at the later "active" phases, thus minimizing or eliminating the likelihood of delay for exploration and production of OCS oil and gas. Only new or significantly changed circumstances will ordinarily allow a previously determined location or lease condition to be challenged.

—Failure to apply 307(c)(1) to Interior's OCS activities would consistitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities significantly affecting the coastal zone. The exemption is particularly unreasonable in light of the fact that other Interior public land management activities which significantly affect the coastal zone (e.g., onshore oil and gas, geothermal and coal development) are subject to the federal consistency requirements. Allowing this adverse precedent to be set would encourage other federal agencies to claim implied exemptions whenever "state consultation" procedures are incorporated in legislation enacted subsequent to the 1972 CZMA. Accordingly, an exemption for Interior could be the first step towards serious erosion of the consistency provisions, and consequent intergovernmental conflicts.

In conclusion, sound policy considerations and legal analysis dictate that 307(c)(1) be applied to Interior's OCS prelease sale activities. Such application will encourage state cooperation, avoid lawsuits, and promote oil and gas development activities while minimizing adverse effects on the

coastal environment. The plain meaning of the CZMA as originally enacted and as amended, the legislative history of the 1976 CZMA amendments, and the words of the OCSLAA and its legislative history all indicate that section 307(c)(1) consistency requirements apply to OCS pre-lease sale activities. There is no legislative support for any interpretation that Interior's OCS pre-lease sale activities are exempt from the federal consistency requirement of section 307(c)(1) of the CZMA. Such exemption is inconsistent with the 1976 amendments to the CZMA. Amendments at that time dealt with section 307(c)(3), and Congress specifically did not change the applicability of section 307(c)(1). The OCSLAA also lends support to inclusion rather than exemption. That statute is silent, and the legislative history reveals that Congress intended section 307(c)(1) to continue to apply. In sum, Interior's interpretation lacks foundation in logic, law and evidenced Congressional intent.

California Coastal Commission
631 Howard Street, 4th Floor
San Francisco California 94105
(415) 543-8555

July 8, 1980

Cecil Andrus
Secretary of the Interior
U.S. Department of the Interior
Washington, D.C. 20240

Dear Secretary Andrus:

While we have been unable to agree in formal mediation proceedings whether Section 307(c)(1) of the Coastal Zone Management Act requires DOI to submit a consistency determination for OCS lease sales, the California Coastal Commission continues to maintain that the Final Notice of Sale is the key Federal activity which opens thousands of acres of the OCS to oil and gas development and sets in motion a series of events which have consequences in the coastal zone. Accordingly, it is the Commission's position that DOI must submit a determination that the Proposed Notice of Sale for OCS Lease Sale #53 is consistent, to the maximum extent practicable, with the California Coastal Management Program. The purpose of this letter is to formally request submittal of a consistency determination at the time of the Proposed Notice of Sale, which is scheduled for October 1980.

At the conclusion of the mediation proceedings, Secretary Klutznick directed NOAA to promulgate regulations defining the term "directly affect". The Secretary stated that the rulemaking would be guided by the opinion of former Commerce General Counsel Haslam which concluded that the CZMA "contemplates that pre-lease Sale activities as in California be subject to a consistency determination". Since it is highly unlikely that the regulatory definition will be finalized by the time of the Proposed Notice of Sale for Lease Sale 53, we believed it important to inform you of our position at this time.

Pursuant to §930.34(b) of NOAA's consistency regulations, "the consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal activity...." As stated above, we believe that the Final Notice of Sale constitutes the final approval in the case of an OCS lease sale. This is consistent with DOI's view as to the proper pre-lease activity which should be subject to consistency review. In a March 7, 1980 letter to Fran Ulmer of the Alaska Governor's Office, Deputy Assistant Secretary Heather Ross stated:

> The Department views the publication of the final notice of sale as the declaration of this "final approval". Ninety days prior to this final approval coincides with the normal publication date of the proposed notice of sale. Therefore, it is at this point that a consistency determination or a negative determination is made.

On June 18, 1980, you announced final approval of the Five-Year OCS Oil and Gas Leasing Schedule. This schedule accelerated the proposed notice of sale for Lease sale 53 several months to October 1980; the Final Notice of Sale remains at April 1981. The fact that you have accelerated the timing of the proposed notice in no way detracts from the fact that it remains the proper point for a consistency determination. The Coastal Commission submitted extensive comments, both orally at the public hearings and as a portion of the Governor's Office written comments, on the Draft EIS which detailed which basins and tracts should not be offered for lease and which stipulations should be included if the Proposed Notice of Sale for Lease Sale 53 is to be consistent with the Federally approved California Coastal Management Program (CCMP). This early notice of consistency problems of the proposed lease sale should be thoroughly discussed and analyzed in the Final EIS and/or the Secretarial Issue Document for the Proposed Notice of Sale for Lease Sale #53. Despite our legal disagreement on the requirements of §307(c)(1), a June 25, 1980 letter from Clyde Martz to myself stated that "nothing ... bars Interior from making consistency determinations in those cases where comments suggest potential consistency problems".

In addition to the program administered by the Coastal Commission, the CCMP also includes a separate segment for San Francisco Bay implemented by the San Francisco Bay Conservation and Development Commission (BCDC). BCDC both testified at the public hearings and submitted written comments on the DEIS. Since DOI anticipates that San Francisco Bay will be the staging and service area for OCS development the consistency determination accompanying the Proposed Notice of Sale must also analyze consistency with the San Francisco Bay segment of the CCMP.

We look forward to a consistency determination at the time of the Proposed Notice of Sale for Lease Sale #53 in October, and an amicable resolution of this issue.

Sincerely yours,

/S/

MICHAEL L. FISCHER
Executive Director

cc: Heather Ross
Clyde Martz
Michael Glazer

APPENDIX C

C.R. 19, Def. Ex. L-F

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON D.C. 20240

October 22, 1980

Mr. Michael L. Fischer, Executive Director
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 941105

Dear Mr. Fischer:

In your letter of July 8, 1980, you requested a consistency determination for the Proposed Notice of Sale for OCS Lease Sale No. 53. In accordance with the Section 307(c)(1) Federal consistency provisions of the Coastal Zone Management Act (CZMA) and Subpart C of 15 CFR 930, we have assessed the possible effects of the Department's prelease activities associated with OCS Lease Sale No. 53 and found that none directly affects the California coastal zone. I am hereby providing you notification of these findings in accordance with 15 CFR 930.35(d). The reasons for this negative determination are set forth below and in Attachment 1.

We have determined, after a careful review of the Proposed Notice of Sale, that no lessee will be required, as a result of and as the next step following lease award, to undertake an activity with coastal zone effects. In all cases the lessee and the Deputy Conservation Manager must first exercise discretion by making subsequent decisions to initiate for approval and to approve specific action proposals before the coastal zone could be affected. Therefore, we have found, in light of the April 20, 1979, Opinion of the Department of Justice, the October 10, 1979, Opinion of our Solicitor regarding the meaning of the Section 307(c)(1) requirement, and the facts associated with the proposed lease sale, that none of the terms and conditions of Lease Sale No. 53 as reflected in the proposed notice of sale nor the subse-

quent award of leases will directly affect the California coastal zone. The details of this finding as it applies to the proposed decision to lease the set of tracts under the specified stipulations are discussed in Attachment 1.

In further response to your July 8, 1980, letter, I would like to indicate in more detail why I believe a consistency determination is not required for the pre-lease activities for OCS Sale No. 53 and why I believe it would not be constructive or meaningful to make one.

I believe that this finding is in keeping with the intent of the Section 307(c)(1) provisions and also represents good public policy. An assurance of consistency by the Secretary of Interior under 307(c)(1) is required only for Federal activities which directly affect the coastal zone. The effects on coastal land and water use which may arise from post-lease activities (which are subjects to Section 307(c)(3) consistency procedures) are not, for Sale #53, direct effects of leasing decisions but rather the effects of subsequent decisions and events. Thus, these post-lease operational activities are not subject to a consistency determination under section 307(c)(1).

Section 307(c)(3) includes provisions to assure that no OCS operational activity will be inconsistent with the California Coastal Management Program (CCMP). Through your authority under this section, the California Coastal Commission (CCC) can, barring the exceptional case of an override by the Secretary of Commerce under Sec. 307(c)(3)(B)(iii), prevent or require the modification of any of the federally permitted OCS operational activities, and their associated facilities, which affect any land use or water use in the coastal zone and are found to be inconsistent with the CCMP. Through this statutory framework, California is assured that, by exercise of its own authority, only consistent activities will occur after lease award. It does not have to reach out, through Federal pre-lease consistency responsibilities, to limit sale proposals and thereby preclude energy development opportunities before specific activities are proposed or their specific coastal effects evaluated.

Your request for a consistency determination for OCS Sale No. 53 pre-lease activities appears to be based on your agency's view of the term "directly affecting" as meaning "sets in motion a series of events which have consequence in the coastal zone." The result of this interpretation is that all effects on the coastal zone of both pre-lease and post-lease activities must be considered as "direct". Using this logic, the word "direct" would be a meaningless modifier since this interpretation would require that the consistency of post-lease OCS activities be assured under both Sections 3207(c)(1) and 307(c)(3), leaving no distinction between these two requirements. We believe this interpretation was not the intent of Congress and would not be workable.

The Department has carefully analyzed the June 4, 1980, CCC comments on the DEIS and your testimony at the EIS hearing in San Francisco on June 23, 1980, as well as all the other comments and views which were provided to us. Those materials have been of great assistance in apprising us of your views and concerns. The degree of detail you provided allows us to carry out our responsibilities with full understanding of your recommendations. A description of the measures we have taken which we believe are responsive to your concerns is included in Secretary Andrus' letter to Governor Brown (Attachment 2).

Sincerely,

/s/ _____

Assistant Secretary—Policy, Budget and Administration

Attachment 1
APPLICATION OF CONSISTENCY REQUIREMENTS TO CENTRAL AND NORTHERN CALIFORNIA OCS SALE PRE-LEASE ACTIVITIES

In order to carry out its responsibilities under Section 307(c)(1) of the CZMA, the Department of the Interior has reviewed its pre-lease activities which will culminate in a Final Notice of Sale for Central and Northern California OCS sale #53. Based on the content of the proposed Notice of Sale, which includes the proposed stipulations and set of tracts to be offered for sale, the Department has found that neither the decisions to impose the stipulations nor the decisions concerning sale configuration directly affect the coastal zone of California. These findings are discussed below.

STIPULATIONS INCLUDED FOR THE CENTRAL AND NORTHERN CALIFORNIA OCS SALE

In general, lease stipulations impose legal requirements. However, it is necessary to examine each stipulation in light of the interpretation of pre-lease consistency requirements given in the October 10, 1979, Solicitor's opinion to determine if it causes a direct effect. Each stipulation has been analyzed in this manner. The rationale for the findings for each is as follows:

Stipulation 1 states that the Deputy Conservation Manager (DCM) may require environmental surveys on certain tracts if he has reason to believe biological populations or habitats exist and require additional protection. Upon making a finding of the existence of special biological resources, the DCM shall give the lessee written notice of the invocation of this stipulation. Depending on the results of the survey, the lessee may be required to take certain actions to avoid biological damage. However, the imposition of this stipulation is not an activity directly affecting the coastal zone since the DCM must make a decision subsequent to the lease sale as to whether and when to invoke this stipulation and so inform the lessee before the surveys would be initiated. Secondly, the stipulation indicates that if during OCS operations a significant biological resource is discov-

ered, reasonable efforts will be made to preserve and protect the resource. This part of the stipulation does not come into force until after the DCM decides to approve the operational plans, thus, its imposition is not an activity directly affecting the coastal zone.

Stipulation 2 states that the DCM may require the lessee to conduct remote sensing surveys to ascertain whether cultural resources exist on the leasehold which may be affected by lessee operation. After assessment of the survey, the stipulation requires lessees to report any significant historic or archeological discoveries which are made during the conduct of operations on an OCS leasehold. The lessee is directed to make every possible effort to preserve and protect the discovery until directions are received by the DCM. No activity is required or prohibited which could have a physical impact on the State's coastal zone. Thus, the imposition of this stipulation is not an activity directly affecting the coastal zone.

Stipulation 3 provides that the DCM shall not allow certain OCS operational activities in potential geologic hazard areas unless the lessee can demonstrate that the proposed operation can be conducted safely on the lease or from areas adjacent to it. The invocation of this stipulation is dependent on a subsequent decision by the DCM and therefore, is not an activity which directly affects the coastal zone. If exploratory drilling operations are subsequently allowed in these areas, site-specific surveys shall be required and further, if emplacement of structures or seafloor wellheads for production are allowed, all unstable areas must be mapped. In all cases events and decisions subsequent to lease issuance must occur first, namely the submission to and the approval of an exploration plan by the DCM. Therefore, imposition of these parts of Stipulation 3 is also not an activity directly affecting the coastal zone.

Stipulation 4 requires certain lessees to cooperate with the appropriate military agency in the conduct of OCS related activities. No activity is required or prohibited which could have a physical effect on the State's coastal zone. Thus, the imposition of this stipulation is not an activity directly affecting the coastal zone.

Stipulation 5 requires certain lessees to assume all risks of damage or injury to persons or property in cases involving the U.S. Government related to programs and activities of the Western Space and Missile Center, Pacific Missile Test Center, or other appropriate military agencies. Such an agreement requires the lessee to take no activity which would have a physical effect on the coastal zone of California and thus is not an activity directly affecting the coastal zone.

Stipulation 6 requires pipelines to shore under certain circumstances and specifies that they be designed and constructed to provide protection from certain hazards. However, before such a pipeline could be built, a decision by the lessor as to its net social cost, a judgment of its technical feasibility, and a decision to issue a permit for its construction must occur. Thus, the imposition of this part of the stipulation is not an activity directly affecting the coastal zone. In those cases where surface vessels must be used to transport hydrocarbons, such as in the case of an emergency, the stipulation further requires that all vessels used must conform with all standards pursuant to the Port and Tanker Safety Act of 1978 (P. 95-474). The stipulation results in no immediate activity but is only applicable after a subsequent events and decisions by the DCM related to the exploration phase of OCS oil and gas operations. Therefore, the imposition of this part of the stipulation is not an activity directly affecting the coastal zone.

Stipulation 7 requires that subsea protrusions related to OCS activities be protected, if feasible, against commercial trawl gear. Latitude and longitude coordinates, as well as water depths, of structures such as well heads and temporary abandonments must be submitted to the DCM. However, the stipulation is not effective immediately since a decision to issue permits for construction of pipelines and other structures must occur first. Therefore, the imposition of this stipulation is not an activity directly affecting the coastal zone.

Stipulation 8 requires lessees to include proposed fisheries training programs in their exploration and development plans for review and approval by the DCM. Since the prep-

aration and submission of these training programs cause no physical effects on the coastal zone and since they must be approved by the DCM before they will be conducted, this stipulation is not an activity directly affecting the coastal zone.

Stipulation 9 provides for the reduction of the royalty rate by the Director of the Geological Survey under some circumstances. Since the stipulation does not take effect until the Director decides to initiate such a reduction and since changes to royalty rates have no effect on the coastal zone, the imposition of this stipulation is not an activity directly affecting the coastal zone.

Final Configuration of Lease Tracts

In addition to stipulations, the Secretary's decision to issue the Final Notice of Sale for the Central and Northern California OCS Sale will identify exactly which tracts will be offered for sale. This decision is not an activity directly affecting the coastal zone because no changes to coastal resources or physical impacts on the coastal zone are possible without subsequent decisions and actions.

In addition, the October 10, 1979, Solicitor's opinion indicates that "... we do not believe that remote or highly speculative coastal zone impacts, such as alleged changes in property values or possible effects on the potential use of a given area within the coastal zone, are impacts which trigger the consistency requirements of §307(c)(1)." Thus, any such effects, even if it could be ascertained that they indeed were motivated in part by OCS Lease Sale No. 53 pre-lease activities, should not be considered as direct effects on the coastal zone.

CALIFORNIA COASTAL COMMISSION
631 Howard Street, San Francisco 94105—(415) 543-8555

California Coastal Commission Resolution on the Secretary of Interior's Proposed Notice of Sale for OCS Lease Sale #53

Adopted December 16, 1980

The Commission commends Secretary Andrus for deleting the four northern basins in proposed OCS Lease Sale #53. The Secretary has been very responsive to State and local expressions of concern. We strongly support Secretary Andrus' decision to exclude these four basins from the Call area in Lease Sale #73, avoiding a frustrating repetition of analyses and debates recently experienced in the process leading up to this proposed OCS Lease Sale #53.

Regarding the Santa Maria Basin, the Commission continues to recommend that leasing be delayed until important studies underway for that area can be completed and incorporated into decisions to offer certain tracts for lease. Several persons testified on the need for results of these studies before a leasing decision is made, including San Luis Obispo Council of Governments (SLO COG). These studies are (1) an oceanographic and meteorological study of Offshore California (wind and currents) necessary for accurately determining oil spill trajectories and conducting an oil spill risk analysis; (2) the Geologic Hazards Study for Central and Northern California; and (3), the Coast Guard Study of Vessel Traffic and Port Access Routes along the central and northern California coast. Information from each of these studies could be applied on a tract by tract basis in the Santa Maria Basin to determine which tracts present the greatest potential for oil spills, vessel traffic conflicts, or oil reaching sensitive biological resources in nearshore or onshore areas.

In addition to the need to complete the above studies, the Commission agrees with Friends of the Coast that the sale should be delayed because of the numerous tracts still available to the industry for OCS oil and gas exploration and development in the Santa Barbara Channel, just south

of the Santa Maria Basin. The oil industry has been dilatory in exploring the leases purchased in 1968 and 1975 in and around the Channel and is just beginning to explore tracts purchased in Lease Sale #48, held in June 1979.

If Interior decides to go ahead with Lease Sale #53 as scheduled in May 1981, the Commission recommends that the following tracts be deleted from the sale: 129-155, and 158-161. These 31 tracts or portions of these tracts are within 12 miles of the range of the threatened southern sea otter. The sea otter spends almost 100% of its time in the water, rarely hauling out. Breeding and pupping take place in the water. Given the otters' extreme vulnerability to oil spills and the considerable threat of oil spills in the Santa Maria Basin, the Commission concurs with Friends of the Sea Otter and the California Department of Fish and Game that the risk to the otter population is too high to warrant leasing of these tracts.

Furthermore, because there is an inconsistency between the California Air Resources Board regulations, as incorporated in the California Coastal Management Program, and the regulations and proposed regulations of the U.S.G.S. as they relate to air quality, the Commission believes that permits are less likely to be granted if the regulatory scheme is not adjusted to adequately address the State's concerns in this area. Therefore, the sale should be delayed until such time that the Department of Interior delegates air quality permit and enforcement responsibilities to CARB and local air districts or adopts a lease stipulation incorporating the recommendations made by the CARB in these proceedings.

The Commission expresses its strong support to the Governor for the lease stipulations as proposed by the San Luis Obispo County Council of Governments and Santa Barbara County. The Commission particularly recommends the Governor accept the Santa Barbara County stipulations with respect to protecting the biological environments and avoiding geoplogic hazards.

Many citizens and groups testified before the Commission at the December second meeting in Monterey on the potential hazards to the environment, indicating a great

deal of concern for the San Luis Obispo County area. Much of the testimony has been summarized in the staff analysis and some of it has been attached. Those who testified were: Ronald De Carli (San Luis Obispo County and Council of Governments), Kurt Kupper (Supervisor San Luis Obispo County), Dr. Thomas Williams (sea otter researcher), Deborah Nelson (San Mateo County), William J. Francis (Monterey Penisula Audubon Society), Jan Clucas (San Luis Obispo League of Women Voters), Donna Di Rocco (various environmental groups in San Luis Obispo County), Tom Silva (American Cetacean Society), Beryl Reichenberg (Clean Air Coalition), David Bockman (for John Ashbaugh of the Sierra Club), Peter Morrison-Meshot (Harbinger Communications and Save Our Shores), Carol Fulton (Friends of the Sea Otter), Julie Bott (Friends of the Coast), Connie Parrish (Friends of the Earth), Richard Charter (Local Government Coordinator for Lease Sale #53), Bob Hardy (Department of Fish and Game sea otter specialist), H. Meyer, and M.H. Graham (Morro Coastal Audubon Society). The Commission appreciates the informative and useful testimony offered by these people.

The Commission recognizes that major conflicts could arise between OCS petroleum exploration and development activities and the biological and recreational resources in the Basin area. Commercial fishing areas, seabird foraging and resting locations, recreation spots, and whale migratory routes are important examples, as the American Cetacean Society and the Morro Coast Audubon Society testified.

The major risk to these resources is the added potential for major oil spills that could result from offshore oil development and transportation. This risk would be added to the existing risk of oil spills from coastwise tanker traffic and from the operation of the six marine oil terminals in Estero and San Luis Obispo Bays. The Commission agrees with the testimony from San Luis Obispo County that existing oil spill response capabilities in most weather conditions cannot adequately contain and clean up a spill. The California Coastal Act recognizes this inadequacy. It states that oil development may be permitted to maintain a

healthy economy even though the development may pose added threats to coastal and marine resources protected by the Coastal Act policies.

The Commission is extremely concerned about the adequacy of oil spill response capabilities. The Commission has used Coastal Energy Impact Program funds for an evaluation of these capabilities. The Commission will use the results of this evaluation, due early in 1981, to assure through consistency reviews that the best available, state-of-the-art oil spill response equipment and systems are in place if there is offshore exploration and development in the Santa Maria Basin.

The Call for Nominations for this Sale included ten million acres offshore the California coast. In response to State comments, Interior deleted tracts offshore the Ano Nuevo Ecological Preserve and offshore Trinidad at that time. The federal Environmental Impact Statement analyzed 243 tracts, most nine square miles in area. Secretary Andrus' Proposed Notice of Sale deletes more than half these tracts, leaving 113 tracts in this proposed decision. This proposed decision did delete all the tracts recommended to him for deletion by the State and the Coastal Commission in commenting on the Draft Environmental Impact Statement. The Commission's position was that the middle three offshore basins should be deleted because the estimates of petroleum resources were low and the environmental risks to these scenic, rural areas without industrial or petroleum development were high.

The Commission is recommending further deletion of 31 tracts at this time, in spite of the ignored request for delay, for four reasons: (1) the Secretary of Interior has decided in both the National Five Year OCS Leasing Schedule and in his proposed decision on OCS Sale #53 not to delay this Sale; (2) the U.S. Fish and Wildlife Service biological opinion on the risks to the sea otter was not available until after the environmental statement hearings; (3) weighing the national interest in protecting the small population of the threatened southern sea otter against the petroleum resource potential of the 31 tracts in the northern part of the Santa Maria Basin comes out in favor of the threatened sea

otter, and (4) the EIS lacked adequate baseline data and analysis. The phrase "national interest" is not just a code word for "oil production". The national interest also includes protecting other valuable marine and coastal resources such as endangered species, shipping, commercial fishing, and important habitats for marine mammals and seabirds.

The Commission is not recommending further tract deletions, although other State agencies and a number of parties who testified at the Commission's public hearing urged further deletions. These urgings included recommendation to delete tracts to protect air quality, commercial fishing areas, areas to which the sea otter may migrate in future years, beach recreation areas, rocky intertidal habitats, and rocks and beaches where marine mammals and seabirds may rest at different times of the year. The Commission recognizes that offshore oil development may pose risks to all these resources. These concerns are addressed in the Interior Department's lease sale stipulations and OCS Orders governing all operations on the OCS and would be addressed through Coastal Commission consistency reviews and local government permit proceedings on any proposed onshore support facilities.

Under the Coastal Act the Commission has been consistent in objecting to proposed offshore oil development within specific buffer zones around special sensitive marine mammal and seabird breeding areas, such as the Channel Islands. Objecting to development near the breeding sea otters is consistent with these positions. The Commission has balanced the national and State interest in domestic oil production with the risks to these breeding areas and has determined the balance has favored protection. The President has recognized this in designating the Santa Barbara Channel Islands Marine Sanctuary. But the Commission and the State have not objected to offshore oil leasing in San Pedro Bay, in the Santa Barbara Channel, and in the ocean area to the west of Point Conception just south of the Santa Maria Basin, even though oil spills from those areas could affect a wide range of coastal and marine resources.

The Commission is deeply concerned about protecting the many valuable coastal resources along the northern Santa Barbara County and San Luis Obispo Bay area coast, including the Nipoma and Guadalupe Dunes, Avila State Beach, the rich agricultural lands in the Santa Maria River Valley, the commercial and recreational boats at Port San Luis, and the views from Pismo Beach. But the Commission is not recommending deleting more than 31 of the 113 tracts on the Santa Maria Basin OCS for the following reasons. One is that the petroleum potential for those 82 remaining tracts is high, as they are a continuation of the already producing Santa Maria Basin onshore. The Commission recognizes that both the nation and the State of California import about half their oil supplies and that slowing the decline in domestic oil production through development of new OCS areas can be in the national interest.

Second, the Santa Maria Basin onshore is already an oil-producing area, including production from the Guadalupe Oil Field in the coastal zone. This part of the coastal zone has a refinery, marine oil terminals and oil storage areas, and an onshore pipeline network.

Third, the State's policy is that only offshore areas can be leased where pipeline transportation to market could be feasible. The Commission assures the Interior Department that the feasibility of pipeline transportation of oil would be a major consideration in any permit or consistency review of proposed offshore development in the Santa Maria Basin.

The Commission determines that deleting the 31 northern tracts in the Santa Maria Basin is necessary for the Lease Sale to be consistent with the federally approved California Coastal Mnagement Program. This does not imply that all development of the other 82 tracts would be consistent, only that there are not the reasons, on balance, at this time under the Management program to determine that there is no way to develop those tracts consistent with the policies of the California Coastal Act.

The leasing of OCS tracts adjacent to State tidelands could result in drainage of the State's petroleum resources, forcing petroleum development by the State Lands Commission. The Commission recognizes that such tideland de-

velopment could threaten coastal and marine resources. This threat may not be consistent with the California Coastal Management Program.

The Commission is strongly concerned about the cumulative impacts from potential petroleum development in the Santa Maria Basin added with developments in the Santa Barbara Channel area on existing leases.

CONSISTENCY

The Coastal Commission continues to maintain its position that a decision to offer tracts for lease directly affects the coastal zone and therefore requires a determination of consistency with the California Coastal Management Program by the Interior Department. Interior did not submit a consistency determination. Instead the Commission received a "negative" determination with the Proposed Notice of Sale, even though the decision includes leasing 600,000 acres, three to twenty-seven miles offshore the California coast, for oil and gas development. The Commission has disagreed with Interior's position on lease sale consistency through Lease Sale #48 and through formal mediation under the auspices of the Secretary of Commerce.

The Commission continues to believe that Interior's failure to issue a consistency determination with the Proposed Notice of Sale is in violation of Section 307(c)(1) of the Coastal Zone Management Act. Thus, even though the Commission is pleased that Secretary Andrus has deleted the middle basins and the Eel River Basin from the Proposed Notice of Sale, the Commission continues to believe this decision should have been accompanied by a consistency determination.

The Commission now states that leasing within 12 miles of the Sea Otter Range in the Santa Maria Basin would not be consistent with the CCMP. Any attempt to explore or develop these tracts will face the strong possibility of an objection to a consistency certification of the Plan of Exploration or Development by the Commission.

Finally, if the Final Notice of Sale reinstates any of the four northern basins and does not include a consistency determination by the Interior Department, the Coastal Com-

mission will initiate legal actions to enforce what it believes to be the clear requirements of the Coastal Zone Management Act.

STATE OF CALIFORNIA
GOVERNOR'S OFFICE
SACRAMENTO 95814
916/445-2843

December 24, 1980

EDMUND G. BROWN JR.
Governor

The Honorable Cecil Andrus
Secretary of the Interior
Interior Building, Room 6151
18th & C Streets, N.W.
Washington, D.C. 20240

Dear Cece:

Enclosed are my recommendations relating to Outer Continental Shelf Lease Sale 53. While I am deeply appreciative of your decision to remove the four northern basins from Lease Sale 53, I am requesting that you delay Lease Sale 53 until crucial studies of geologic hazards, wind and currents, port access and marine traffic routes and marine mammal, sea bird and other coastal habitats are completed. I do not believe that at this time adequate information exists to proceed with the sale.

As you are aware, it has been the policy of my Administration that the development of the OCS should only occur where the resource is sufficient to justify pipeline transportation of produced oil and gas to refining and processing centers. In addition, California strongly objects to including in OCS sales those areas where information is insufficient to adequately evaluate the economic, environmental, and social impacts of leasing or where the known risks to the environment, the existing economy or to marine traffic are high.

Of particular concern is the absence of federal regulations adequate to protect California onshore air quality. California and affected local air pollution authorities have repeatedly stated that DOI's regulations on air quality will cause San Luis Obispo and Santa Barbara Counties to vio-

late the National Ambient Air Quality and State standards for ozone. Included in the enclosed recommendations are two options; either will enable leasing to proceed without sacrificing onshore air quality.

Regardless of when Lease Sale 53 occurs, I am also requesting that you delete tracts 129 through 155, and 158 through 164 inclusive. These tracts are directly seaward of the habitat, breeding and food supply areas of the Southern Sea Otter. The otter, a threatened species, is extremely sensitive to the effects of oil. These tracts also include valuable sea bird and sea mammal habitat, rocky intertidal and subtidal zones, commercial and sport fisheries, and recreational areas. Moreover, the area is geologically unstable, increasing the likelihood of OCS accidents. Leasing of these tracts would be inconsistent with California's federally approved Coastal Plan.

It should be noted that I have recommended for deletion only those tracts where multiple use conflicts exist and where leasing presents an unacceptable risk now and in the future. For other tracts where there are uncertainties, I am recommending lease stipulations which institute special protection measures but allow exploration and development to proceed. I also recommend in a proposed lease stipulation that I be consulted prior to USGS decisions regarding the timing and location of OCS activities which may significantly affect coastal and onshore social, economic, and environmental resources.

I feel my recommendations provide reasonable mechanisms to ensure the balance of national and regional interest which Congress intended. Should you or your staff have questions, please contact Ms. Deni Greene, at 916/322-2318.

Sincerely,

/s/

EDMUND G. BROWN JR.
Governor

STATE OF CALIFORNIA
GOVERNOR'S RECOMMENDATION
in response to
DOI Proposed Notice of Sale
Lease Sale #53

INTRODUCTION

California's policy, as Governor Brown has repeatedly stated, including at his meeting with Secretary Andrus at their May 30, 1980 meeting, is that development of the OCS should only occur where the resource is sufficient to justify pipeline transportation of produced oil and gas to refining and processing centers. In addition, California strongly objects to including in OCS sales those areas where information is insufficient to adequately evaluate the economic, environmental and social impacts of leasing, or where the known risks to the environment, the existing economy or to marine traffic are high.

California agrees with and applauds the Secretary's statement issued with the Proposed Notice of Sale for Sale #53, "deletion of the three central basins represents his best judgment as to the balance between our continuing need for domestic sources of energy and other important considerations including the preferences and well-being of people in coastal areas who may be affected by offshore oil and gas activities." We also agree that the Eel River Basin should be exluded for those same reasons, as well as for the inadequate analysis of oil related impacts in the EIS.

California recommends that the decision to delete the Eel River, Pt. Arena, Bodega and Santa Cruz Basins be sustained in the Final Notice of Sale for Sale #53. We also also urge that they be deleted from the Tract Selection for Sale #73 which is now beginning, and all future sales on California's OCS. These four basins include relatively insignificant oil and gas resource potential but extremely valuable marine and coastal resources and dependent fishing and tourist industries. The renewable resources of California's northern Coast must not be sacrificed for minor, nonrenewable oil and gas development. The Secretarial Issue Document (SID) highlights the minimal benefits that may

result from leasing these areas: "The main benefit of proceeding with Sale 53 are (sic) the savings from producing oil and gas domestically rather than purchasing equivalent imports." (page 15). As uncontrolled oil OCS production will sell at or near world prices with little or no savings achieved. Also, as we have frequently pointed out, due to the lack of transportation to move western oil east and lack of processing facilities for heavy oil, west coast production is unlikely to back out foreign imports to any substantial degree.

Further, the adverse impacts to the region as a result of the Sale (listed at page 16, item C of SID)

—commercial fishing
—recreation and aesthetics
—socioeconomic systems
—marine and coastal ecosystems
—archaeological and cultural resources
—ports and navigation
—air quality
—water resources

have not been adequately evaluated as required by NEPA. The USGS's revised resource estimates, not considered in the EIS, radically expand the potential level, extent, and length of development activity which could occur in the Sale 53 area. California believes that the lack of critical information and of an adequate Environmental Impact Statement makes a sustainable decision impossible. Critical studies only now underway include:

(1) West Coast Meteorological Buoy Monitoring Network (wind and ocean currents) necessary for accurately determining oil spill trajectories and conducting an oil spill risk analysis, (due 12/83);

(2) Geologic Hazards Study for Central and Northern California, (publication expected 1/81 but not evaluated in the EIS);

(3) Coast Guard Study of Vessel Traffic and Port Access Routes along the Central and Northern California coast, (no completion date available);

(4) Marine Mammal and Sea Bird Study for Central and Northern California, (completion of three year study due 10/83);

(5) Northern California Risk Assessment to Marine Coastal Habitat, (due 12/81);

(6) Sea Bird Oil Behavior Study, (draft due 1/82); and

(7) Commercial and Sports Fishery Oil Toxicity Study, (draft due 8/81).

The results of these studies must be applied on a tract-by-tract basis in the Santa Maria Basin to adequately determine which tracts present the greatest potential for oil spills, vessel traffic conflicts, or oil spills reaching sensitive biological resources.

Protection of onshore air quality is an issue of considerable concern to California. As you are undoubtedly aware, the federal Environmental Protection agency has imposed sanctions on California under the Clean Air Act. California does not believe that the Department of the Interior is presently able to evaluate and prevent significant onshore air quality impacts from emissions associated with the exploration and development of the OCS off our coast. The DOI, based on inadequate data and a misinterpretation of existing conditions has reached incorrect conclusions regarding the measures necessary to protect coastal air quality. Based on these incorrect conclusions the DOI proposed to rely on inappropriate, inadequate regulations adopted by the USGS for control of air emissions. California has repeatedly stated that the proposed regulations published March 7, 1980 and not yet finalized, are fundamentally inadequate for the following reasons:

—the regulations allow uncontrolled emissions of ozone;

—the regulations allow uncontrolled emissions of volatile organic compounds (VOCs), which are precursors of ozone;

—the regulations will result in violations of the National Ambient Air Quality and State standards for ozone; and

—the regulations fail to consider cumulative impacts.

RECOMMENDATIONS

Pursuant to Section 19 of the Outer Continental Shelf Lands Act Amendments, California makes the following recommendations regarding the size, timing, and location of

the proposed sale. California's recommendations, prepared by the Office of the Governor in consultation with state agencies and local government, represent a balance between development of oil and gas resources and the well-being and preferences of citizens of California.

1. *Delay the Sale*

a) Pending completion of necessary studies, there is inadequate information to support a decision to lease. Prior to Sale 53, studies and findings must be completed and incorporated in an updated environmental document and risks of unavoidable, irreversible impacts must be minimized or mitigated with special protective measures. Without a delay, it is not possible to ensure that the public trust is fulfilled and that the Congressionally mandated balancing of the National interest and the well-being of citizens of the affected State is accomplished.

b) Adequate measures to protect onshore air quality must be in place before a sale is held.

California offers two options for providing adequate air quality protection:

OPTION #1:

The DOI and USGS shall negotiate an agreement with the CARB and affected local air pollution control districts transferring to them all air quality permit responsibilities, authority, and enforcement jurisdiction for Lease Sale #53 which the aforementioned federal agencies now have or claim to have under existing law; or

OPTION #2:

Adopt California's proposed lease stipulation No. 12 which specifies air quality protection measures necessary to prevent violation of onshore air quality standards. (All of California's proposed stipulations follow below.)

Adoption of either option by the Department of the Interior will enable leasing to proceed without sacrificing onshore air quality.

2. Regardless of when Lease Sale 53 occurs, delete Sale Tracts 129 through 155 and 158 through 164 inclusive. Leasing of these tracts is an unacceptable risk now and in

the future, and would be inconsistent with California's federally approved Coastal Plan. Deletion of these tracts is necessary to protect:

—threatened sea otters and their habitat, 129-161
—valuable sea bird roosting, nesting and feeding areas, 129-161
—rocky intertidal and subtidal zones, 129-161
—other marine mammals (e.g., seals, sea lions), 129-161
—state petroleum reserves in critical habitat areas, 129-161
—recreational areas, 129-161
—Commercial and sport fisheries, 131, 138, 141-143, 145-147, 148-151, 154-155, 160-161
—geohazards in nearshore critical habitat areas, 131, 134, 138, 146-147, 151, 152, 161-164
—port access and navigational safety, 129-134, 162-164, 158-160, 154-155.

Detailed summaries of the material supporting these deletions is included below. Additional detail can be found in California's comments on the Draft and Final EIS and in State agency comments on the Proposed Notice of Sale, which are attached as Appendix A.

3. Institute the Following Special Lease Stipulations:

Information available clearly supports implementation of proposed stipulations to ensure appropriate measures during OCS activity in the Santa Maria Basin. Stipulations are summarized here with full text attached under Stipulations section below.

1) Biological Stipulation

This standard stipulation has been modified for Sale 53 to ensure that, should the Sale occur prior to completion of BLM Marine Mammal and Sea Bird Studies in October 1983, surveys will be done prior to siting OCS structures to identify and protect significant biological resources. Should such resources be identified we recommend consultation with the Governor prior to any decision regarding disposition.

2) Cultural Resource Stipulation

California recommends that this standard stipulation be modified only to provide that the Governor may notify the DCMOFO of known cultural resources, thereby triggering application of the stipulation.

3) Geologic Hazards Survey Stipulation

California supports the stipulation in the Proposed Notice of Sale, and recommends that it also apply to tracts 179-180, 185-186, 194, 200-201, 206-208, 212-214, 219-222, 225 due to potential slumping and unstable slopes.

4) Military Stipulation—Acceptable as proposed.

5) Military Stipulation—Acceptable as proposed.

6) Pipeline Stipulation

Provides that pipelines will, to the maximum extent practicable, be used to transport production and describes the procedures for determination of routes.

7) Wells and Pipelines Stipulation

Provides (a) design of equipment and facilities to prevent damage to fishing gear; (b) procedures for reporting locations of structures which are potential obstructions to fishing gear; (c) requires that reporting include Loran C fixes; and (d) requires significant sea floor disturbances be recontoured to minimize conflicts to fishing gear.

8) Support as proposed—Fisheries training program designed to minimize conflicts of OCS operations with fishermen.

9) Support as proposed—Specifies royalty structures and applications.

10) Air Quality Stipulation

This stipulation is proposed to implement air quality protection under California's Option #2 as described above, and delineates the control requirements and procedures necessary to avoid violation of onshore air quality standards. This stipulation shall apply to all leases.

11) Sea Otter Stipulation

This stipulation shall apply to all leases issued for Sale 53. It provides that prior to approval of exploration plans lessees shall reach agreement with USFWS to fund meas-

ures necessary to ensure that survival of the Southern Sea Otter is not jeopardized by OCS development.

12) Seasonal Drilling Stipulation

Stipulation is offered for tracts 201-203, 207-209, 214-216, 221-223, 227-229, 232-234, 235-238, 239-243 where drilling and workover operations between December 1 and April 1 would constitute undue risk to concentrated sea otter populations (which are expanding into this prime habitat) and gray whales and young calves which migrate north during winter. Winter conditions make oil spill containment impossible in this area.

13) Tidelands Drainage Protection Stipulation

Prohibits drilling within one mile of State tidelands seaward boundary to prevent drainage of oil from State tidelands.

SUMMARY OF CALIFORNIA'S CONCERNS

The recommendations presented above are based on the findings of State and local agencies during the OCS planning process for Sale #53 and on review of regulations pertinent to the Sale. Major concerns and issues are briefly summarized here, but California requests that all State and local government comments included in Appendix A and listed in Appendix B be incorporated by reference as part of this submittal.

- Air Quality

At every opportunity, California has explained, in considerable detail, why the USGS regulations do not protect California from significant adverse air quality impacts due to OCS activities (see Appendix A). The DOI has not responded to most of California's concerns.

Sale 53, if carried out pursuant to present USGS air regulations, will result in significant adverse air quality impacts onshore. Our concerns center upon lack of control of:

—ozone emissions;
—volatile organic compound emissions;
—likely violation of National Ambient Air Quality and State Standards for ozone and resultant nonattainment status for San Luis Obispo and Santa Barbara Counties;

—lack of cumulative review.

California's proposed Option #1 has the advantage of relying on state and local personnel who have extensive expertise and experience in air quality permit processing, source testing and enforcement. It makes little sense, from the standpoint of government efficiency, to insist that the USGS devote resources and manpower in an attempt to duplicate activities which state and/or local government agencies are already trained and qualified to do.

Furthermore, delegation to state and local air regulatory agencies or adoption of the proposed stipulation would eliminate existing state-federal conflict under the "consistency clause" of the 1972 Coastal Zone Management Act, (as it affects air quality). The delegation would also ensure that onshore and offshore sources are treated in a consistent manner. This should substantially reduce the likelihood of delays in OCS energy development due to litigation.

California's experience has shown that OCS development can proceed in an expeditious and reasonable manner under state and local supervision. The mitigation agreements voluntarily entered into between California and the industry concerning Exxon's Hondo development, Chevron's Platform Grace, and Shell's Beta Unit all demonstrate that the national interest in energy development can be satisified while, at the same time, the State's interests in the health and welfare of its citizens are protected.

• Oil Spills

California has evaluated available information on oil spill probabilities and trajectories as well as containment and clean up capabilities in the conditions prevalent in the Santa Maria Basin. We conclude: (1) due to questionable data, it is impossible to accurately predict the occurrence or behavior of a spill; (2) until data from climatological, oceanographic and meteorological studies are available in 1983 predictability will not be substantially improved; and (3) existing control and clean up equipment is ineffective under weather and sea conditions which prevail much of the time in the Santa Maria Basin.

• Marine Mammals

The California coast is critical habitat for many species of marine mammals (i.e., sea lions, seals, including the threatened sea otter) and includes migration routes of a variety of whale species. Several of the whale species are threatened or endangered. Special protection must be afforded threatened and endangered species as required by the Endangered Species Act.

• Southern Sea Otter Protection

The Southern Sea Otter, a threatened species, is presently found only along the California Coast from Santa Cruz to Pismo Beach in San Luis Obispo County. The small population (approximately 1500) of the animal, and its extreme sensitivity to the effects of oil on its fur makes the threat of potential oil spills critical. If the Southern Sea Otter is to survive, it must receive special protection.

The Fish and Wildlife Service's Biological Opinion required by the Endangered Species Act emphasizes the sensitivity of the otter to oiling and the high probability that any otters subjected to oiling will die. The FWS also noted the difficulty of protecting or removing otters from the path of oil spills and the danger to its habitat and food supply. Unfortunately, the FWS evaluation was based on oil resource estimates and incomplete meteorological and oceanographic data. The FWS concluded that exploration may not jeopardize the sea otter but that consultation should be reinstituted prior to approval of any development plans.

California concurs with USFWS's discussion of potential impacts of oil on sea otters but does not agree with the USFWS's conclusion. The California Department of Fish and Game has analyzed the USFWS Biological Opinion and its own data on the sea otter population and has consulted with the California Coastal Commission. California is not prepared to accept the risk that a single oil spill may destroy a third of the existing sea otter population and seriously reduce the likelihood of the Southern Sea Otter's survival (FWS Biological Opinion, DOI PNOS Sale 53).

• Bird Resources

Major sea bird populations living along the San Luis Obispo and Northern Santa Barbara County Cost depend

on the sandy beaches, rocky intertidal zones, and estuaries for roosting, nesting and feeding. Over 33,600 individuals were counted in 1979 at Morro Bay alone, one of the most productive areas on the Pacific Coast (according to preliminary BLM studies). Important species in the area include the cormorant, pigeon guillemot, snowy plovers, least terns, and migratory Brown Pelican. Oil coming ashore during the breeding season would have serious adverse effects on the intertidal foraging zones in addition to disastrously effecting the birds themselves.

Also of concern is the protection of migratory birds and their habitat. The U.S. Government has accepted responsibility for such protection under treaties with Canada and Mexico.

• Rocky Intertidal Zones

The rocky intertidal zone extending from Montana de Oro State Park to Shell Beach comprise over 15 miles of virtually undeveloped coastline. The area contains subtidal and intertidal zones of exceptionally high quality. Reefs and rocks from Point Buchon south to Port San Luis contain many rare ecological communities. Irreplaceable, long-term marine experiments have been established in the area to monitor the effects of Diablo Canyon Nuclear Power Plant. The extensive rocky headlands, reefs, and emergent rocks of this shoreline support a luxuriant intertidal vegetation. One hundred and thirteen species of marine algae and flowering plants, including species of all three major groups of benthic marine algae are found in the areas (FEIS, pp. 3-43, 44). These nearshore reefs and intertidal areas are sensitive and extremely vulnerable to degradation from human disturbance, poor water quality and the effects of oil spills.

Hazard Reef, which begins at Hazard Canyon in the Montana de Oro State Park and continues south for nine miles, is a major formation in the area. This reef and the surrounding area to Point San Luis supports a rich assemblage of colonial hydroids, sponges, rock-barring clams, crabs, tunicates, starfish, abalone, sea urchin and other marine invertebrates. Over 90 species of algae are present in the intertidal zone. This is a unique algal zonation, differing from sites north of Morro Bay and south of Point Sal.

• Seal Haul Out Areas

Numerous seal haul out areas have been identified along rocky intertidal areas south of Montana de Oro. Lion Rock and Pecho Rock near Diablo Canyon have been identified as two or the more important offshore rocks found along the coastline. The California Department of Fish and Game reports that up to 1,400 California sea lions have been observed on Lion Rock (1978, unpublished). Young pups have been observed on this rock suggesting that sea lions breed there. As many as 500 sea lions have been seen on Pecho Rock (alternate site analysis, Technical Report No. 23, in Support of the Point Conception LNG Facility DEIR, April 1978, California Public Utilities Commission, A.D. Little Inc., p. 32).

The Department of Fish and Game reported that the San Luis Obispo County's population of harbor seals is 500 to 600 animals with about 10 percent found in the vicinity of Rattlesnake Canyon (1978, unpublished). Important haul out sites include Finger Point, Seal Rock, Windmill Point, Diablo Canyon and Double Rock.

• Recreation Areas and Points of Biological Sensitivity

The Coast of California is heavily used for recreation and is the basis of an extensive tourist industry which is a major factor in the State's economy. In addition to scenic vistas along coastal highways, there are many state, local and federal parks providing access to a rugged, but beautiful coast. Montana de Oro State Park and the Nipomo Dunes are recognized for their outstanding natural features. Other areas of biological sensitivity include: Diablo Cove, Avila Beach, Pismo Lake Ecological Reserve, Dunes Lakes, Guadalupe Dunes, San Antonio Beach, Purisma Point Dune Area, Santa Ynez River Dunes, California Transition Zone, and Point Conception. Should these areas be oiled, the damage to their natural value would be only partly accounted for by the economic loss due to reduced tourism.

• Fisheries, Commercial and Sport

California coastal waters constitute a major source for the west coast commercial fishing industry which is important to the economy of many coastal areas of California and

Oregon. The Morro Bay area supports extensive sport fishing activity. Damage to finfish and shell fish populations from oil spills or interference in fishing operation areas by oil activity will have a major economic effect on these industries. Also valuable to the fishing industry are the kelp beds all along the coast which provide food and shelter to various species of fish during portions of their life cycle. The kelp beds are also an important resource to the kelp harvesting industry which is dependent on the kelp as a raw material, and to the threatened California Sea Otter which uses the calm water and shelter the beds provide for resting and grooming activities.

• Geohazards

The Santa Maria Basin, as documented in the EIS, contains at least three types of geologic features which pose a hazard to oil and gas operations.

1) active seismic fault zones;
2) highly unstable mass movement areas; and
3) steep slopes in potentially unstable areas.

These hazards must be carefully evaluated to determine the potential for catastrophic incidents and resultant oil spills. In relatively remote locations not immediately adjacent to high value environmental resources, it may be possible to mitigate these hazards through special lease stipulations. However, in nearshore tracts adjacent to crucial habitat, deletion is recommended.

• Port Access and Navigation Safety

The Coast Guard will not complete its study of traffic safety and port access routes for the Pacific Coast prior to the scheduled sale date. Therefore, any decision regarding leasing of tracts in existing port access routes to the Estero Bay Marine Terminal and Port San Luis should be deferred pending completion of the Coast Guard studies.

• Protection of State Petroleum Reserves

The State Tidelands from the Santa Maria River north to the San Mateo County line is a petroleum reserve. Oil activity is prohibited unless federal leasing threatens drainage of state resources. In the absence of revenue sharing agreements under Section 8g of the OCSLAA, no leasing

should occur within one mile of the seaward boundary of the State Petroleum Reserve.

CONCLUSION:

The California Governor's Office has carefully reviewed the proposed Notice of Sale, the final EIS, and the comments of the California Congressional Delegation, State agencies, citizens, and local governments. As proposed, Lease Sale 53 does not balance the national interest with the well-being of the citizens of this State as is required by Section 19 of the OCS Lands Act, nor does it meet the balancing test of Section 18 of that Act.

A proper balancing would result in the deletion of 34 critical tracts due to inconsistency with California's federally approved Coastal Zone Management Plan, and conflicts with attaining the federal Ambient Air Quality Standards onshore, protection of a threatened species, protection of other marine mammals and sea birds, maritime safety and the continued viability of commercial and sports fisheries and recreation areas.

The people of California are doing their share to make America independent of foreign energy sources. Lease Sale 53 as modified by the above recommendations not only balances the national interest with the well-being of this State's citizens, but reflects the concerns of the nation as expressed in the OCSLAA, the Marine Mammals Protection Act, the Endangered Species Act, the Coastal Zone Management Act, the Clean Air Act, and the National Environmental Policy Act. The national interest is as well served by nurturing renewable resources as by the one-time production of small amounts of non-renewable oil and gas.

LEASE STIPULATIONS

Stipulation No. 1

Background: Due to lack of adequate information regarding the Santa Maria Basin (as noted in the DEIS and FEIS as well as the State of California in its comments to date) it is necessary that special efforts be taken to identify and protect resources in the area of proposed Lease Sale #53 if the sale is to proceed. Surveys required by this stipulation need not duplicate other efforts if data is available from existing sources in adequate detail to determine appropriate management techniques to ensure protection. It is for this reason that the following stipulation is recommended:

(a) Prior to any drilling activity or the construction or placement of any structure for exploration or development on lease areas including, but not limited to, well drilling and pipeline and platform placement hereinafter referred to as "operation," the lessee shall conduct site specific surveys as approved by the DCMOFO *in consultation with the USFWS, National Marine Fisheries Service, and the Governor of California, to determine if the tract or site contains areas of special biological significance that may be adversely affected by any lease operation.*

Areas of special biological significance shall include, but not be limited to:

—Critical habitat for rare or endangered species.

—Areas containing very unusual, rare or uncommon ecosystems and ecotones.

—Areas of abundant numbers or high diversity of species.

—Areas containing species of limited regional distribution due to natural range or significantly reduced populations.

If the results of such surveys suggest the existence of a special biological resource that may be adversely affected by any lease operation, the lessee shall: (1) relocate the site of such operation so as not to adversely affect the resources identified; (2) establish to the satisfaction of the DCMOFO *and the Governor of the State of California* on the basis of the site specific survey, either that such operation will not

have a significant adverse effect upon the resource identified or that a special biological resource does not exist. The DCMOFO will review all data submitted and determine, in writing, *following consultation with the Governor of the State of California*, whether a special biological resource exists and whether it may be significantly affected by the lessee's operations. The lessee may take no action until the DCMOFO has given the lessee written directions on how to proeceed.

(b) The lessee agrees that if any area of biological significance should be discovered during the conduct of any operations on the leased area, he shall report immediately such findings to the DCMOFO, and make every reasonable effort to preserve and protect the biological resource from damage until the DCMOFO has given *written* directions with respect to its protection.

(c) *The DCMOFO shall make the determination of necessary protection measures based upon consultation with the Governor of the State of California.*

(d) *Based upon the biological surveys the supervisor may also require the lessee to provide for periodic surveys or sampling of environmental conditions during operations and require reasonable corrective measures to mitigate identifiable adverse impacts.*

(e) *The lessee agrees that, if any area of special biological significance should be discovered during any operations on the leased areas, he shall report such findings immediately to the supervisor, and make every reasonable effort to preserve and protect the resource from damage until the supervisor has given the lessee directions to assure protection of the resource.*

Stipulation No. 2

If the DCMOFO, having reason to believe, *or having been notified by the Governor of the State of California*, that a site, structure or object of historical or archaeological significance, hereinafter referred to as a "cultural resource," may exist in the lease area, gives the lessee written notice that the lessor is invoking the provisions of this stipulation, the lessee shall upon receipt of such notice comply with the following requirements.

Prior to any drilling activity or the construction or placement of any structure for exploration or development on the lease, including but not limited to, well drilling and

pipeline and platform placement, hereinafter in this stipulation referred to as "operation," the lessee shall conduct remote sensing surveys to determine the potential existence of any cultural resource that may be affected by such operations. All data produced by such remote sensing surveys as well as other pertinent natural and cultural environmental data shall be examined by a qualified marine survey archaeologist to determine if indications are present suggesting the existence of a cultural resource that may be adversely affected by any lease operation. A report of this survey and assessment prepared by the marine survey archaeologist shall be submitted by the lessee to the DCMOFO, and the manager, *and the Governor of the State of California* for review. If such cultural resource indicators are present the lessee shall: (1) locate the site of such operation so as not to adversely affect the identified location; or (2) establish, to the satisfaction of the DCMOFO *and the Governor of the State of California* on the basis of further archaeological investigation conducted by a qualified marine survey archaeologist or underwater archaeologist using such survey equipment and techniques as deemed necessary by the DCMOFO, either that such operation shall not adversely affect the location identified or that the potential cultural resource suggested by the occurrence of the indicators does not exist.

A report of this investigation prepared by the marine survey archaeologist or underwater archaeologist shall be submitted to the DCMOFO, *the Governor of the State of California*, and the Manager for their review. Should the DCMOFO and *the Governor of the State of California* determine that the existence of a cultural resource which may be adversely affected by such operation is sufficiently established to warrant protection, the lessee shall take no action that may result in an adverse effect on such cultural resource until the DCMOFO, *following consultation with the Governor of the State of California*, has given directions as to its preservation.

The lessee agrees that if any site, structure, or object of historical or archaeological significance should be discovered during the conduct of any operations on the leased area, he shall report immediately such findings to the DCMOFO and make every resonable effort to preserve and protect the cultural resource from damage until the DCMOFO, *following consultation with the Governor of the*

State of California, has given directions as to its preservation.

Stipulation No. 3

No language change recommended. Add tracts listed below to those covered by the provision of the stipulation.

Tract No.	*Justification*
179	S½ within possible slide area
180	SW¼ within possible slide area
185	N1/3-1/2 within possible slide area
186	NW¼ within possible slide area
200	S¼ within possible slide area
206	E¾ within possible slide area
207	Western edge within possible slide area
212	SE¼ within possible slide area
213	All except NW¼ NW¼ within possible slide area
214	W¼ W¼ within possible slide area
219	NE¼ within possible slide area
220	N¼ within possible slide area
194	Possible fault zone
201	Possible fault zone
208	Possible fault zone
215	Possible fault zone
222	Possible fault zone
225	Submarine canyon, moderate slope

Stipulation No. 4

No change recommended.

Stipulation No. 5

No change recommended.

Stipulation No. 6

a) Pipelines will be required: 1) if pipeline rights-of-way can be determined and obtained; 2) if laying of such pipelines is technologically feasible and environmentally preferable; and 3) if, in the opinion of the lessor, pipelines can be laid without net social loss, taking into account any incremental costs of pipelines over alternative methods of transportation and any incremental benefits in the form of increased environmental protection or reduced multiple use conflicts. The lessor specifically reserves the right to require that any pipeline used for transporting production to shore be placed in certain designated management areas

and routed to minimize its proximity to sensitive environmental habitats, identified cultural resources, and sited in such a manner as to minimize, to the maximum extent feasible, risks of pipeline rupture from geological hazards. Section of the means of transportation will be determined in consultation with the Governor of the State of California and in consideration of any recommendation of the intergovernmental planning program for assessment and management of transportation of Outer Continental Shelf oil and gas with the participation of Federal, State, and local governments and the industry.

b). *The lessor reserves the right to determine the method of transportation for processed oil. Wherever feasible, as determined by the DCMOFO in consultation with the Governor of the State of California and the Regional Technical Working Group, onshore pipelines will be used to transport processed oil and gas from onshore or offshore processing plants to refineries. Barging or tankering of production will be permitted only in case of emergencies or under special circumstances as determined by the supervisor after review and consultation with the pipeline working group. Continuous barging or tankering will not be permitted in the event an onshore pipeline for the movement of processed oil from onshore or offshore processing plants to refineries is found by feasibility studies to be the most environmentally sound method of transportation.*

c) Following the completion of pipeline installation, no crude oil production will be transported by surface vessel from offshore production sites, except in the case of emergency. Determinations as to emergency conditions an appropriate responses to these conditions will be made by the DCMOFO *in consultation with the Governor of the States of California.*

d) Where the three criteria set forth in the first sentence of this stipulation are not met and surface transportation must be employed, all vessels used for carrying hydrocarbons to shore from the leased area will conform with all standards established for such vessels, pursuant to the Port and Tanker Safety Act of 1978 (PL 95-474).

Stipulation No. 7

(a) Wells. Subsea well heads and temporary abandonments, or suspended operations that leave protrusions above the sea floor, shall be protected, if feasible, in such a

manner as to allow commercial trawl gear to pass over the structure without snagging or otherwise damaging the structure or the fishing gear. Latitude and longitude coordinates *and Loran C fixes* of those structures, along with water depths, shall be submitted to the DCMOFO. The coordinates of such structures will be determined by the lessee utilizing state-of-the-art navigation systems with accuracy of at least ±50 feet (15.25 meters) at 200 miles (322 kilometers).

(b) Pipelines. All pipelines, unless buried, including gathering lines, shall have a smooth surface design. In the event that an irregular pipe surface is unavoidable due to the need for valves, anodes or other strucutres, those irregular surfaces shall be protected, to the maximum extent practicable, in such a manner as to allow trawl gear to pass over the object without snagging or otherwise damaging the structure or the fishing gear. The lessee shall recontour all significant disturbances resulting from pipeline burial to minimize conflicts with trawl fishing gear.

Stipulation No. 8

As proposed.

Stipulation No. 9

As proposed.

Stipulation No. 10

(a) Best Available Control Technology (BACT) shall be required for EPA criteria pollutants (e.g. volatile organic compounds (VOCs), oxides of nitrogen (NOx), oxides of sulfur (SOx), and particulate matter) which are emitted at a rate of five (5) pounds or more per hour from any OCS facility or support equipment. For the purposes of this stipulation, BACT shall include, but is not limited to:

(1) Water injection, at optimal levels, for control of oxides of nitrogen for gas turbines;

(2) Specially designed burners ("lo-NOx burners") to reduce oxides of nitrogen emissions;

(3) Devices to control 99 percent of sulfur emissions from sweetening operations;

(4) Vapor recovery systems on all storage tanks containing VOCs, and;

(5) Valve maintenance and repair programs as specified in the attached model rule.

In addition, the USGS shall request the Executive Officer of the ARB to make BACT determinations for all OCS emissions sources, and such determination shall be incorporated in the air quality permits issued by the USGS. In making the BACT determination, the Executive Officer shall consult with impacted local air pollution control districts.

(b) An emissions offset package, in compliance with locally impacted area's New Source Review Rules, shall be required for all EPA criteria pollutants that are still emitted at a rate of ten (10) pounds or more per hour after the application of BACT. The USGS shall require the Executive Officer of the ARB to review any offset package submitted by a lessee, and the Executive Officer, in consultation with affected local air pollution control districts, will determine the adequacy of the offset package by evaluating it in light of applicable new source review rules and available offsets. If the Executive Officer determines that the offset package is not sufficient, he shall provide written comments to the USGS specifying the areas of deficiency. The USGS shall then request the lessee to resubmit an offset package which corrects the deficiencies, and shall not issue a permit until such package has been submitted and approved by the ARB's Executive Officer.

(c) For enforcement purposes, the USGS shall require a lessee to submit a performance plan for monitoring or testing the control systems installed on OCS facilities to mitigate OCS emissions. The USGS shall submit this performance plan to the Executive Officer of the ARB for approval. The Executive Officer, in consultation with affected local air pollution control districts, shall approve, modify or disapprove of the plan within 60 days of receipt, and notify the USGS of his determination. Facilities shall not be allowed to operate until a performance plan has been approved.

(d) The USGS shall require the lessee to allow representatives of the ARB and the affected local air pollution control districts to inspect and source test emissions control systems for compliance with permit conditions. The lessee shall provide access to sampling points that will enable rep-

resentatives of the ARB and the district to collect samples of gaseous emissions or to source test the control system.

(e) Violations shall be subject to enforcement actions by state and/or local agencies under applicable federal, state and local laws.

Stipulations 2(a) and 2(b), requiring BACT and offsets, are necessary to satisfy several air quality concerns. First, the exemption limits and "significance" test contained in the USGS regulations will allow substantial new emissions sources to be sited without mitigation. As we have noted in previous comments, any increase in emissions in nonattainment or marginally attainment areas should be and must be regarded as significant, and the onshore areas affected by leases in the Santa Maria Basin clearly fall into that category. Second, the proposed 5 and 10 pound limitations will insure that the cumulative impacts which could result from OCS operations are minimized. In addition, these levels have been determined to be administratively feasible by California's state and local air pollution control agencies, and are in accord with the new source review standards established by San Luis Obispo and Santa Barbara Counties. Finally, the BACT and offset requirements will insure that offshore and onshore facilities are treated in the same manner, and will be consistent with the requirements of the Clean Air Act.

Stipulations 2(c), 2(d) and 2(e), concerning monitoring, inspection and enforcement, are necessary to ensure that required control systems are, in fact, meeting performance specifications. These three provisions are virtually identical to conditions which have been placed in permits for numerous onshore facilities, including Pacific Gas and Electric's geothermal power plant at the Geysers in Northern California.

CONCLUSION

If neither of the two proposals set forth above is adopted, the CARB believes that the size, timing and location of Lease Sale No. 53 activities will result in violations of federal ambient air quality standards, and will significantly impact California's air quality in an adverse manner.

Stipulation No. 11

Background:

The USFWS stated in its opinion, pursuant to Section 7 of the Endangered Species Act, that OCS exploration activities do not constitute a sufficient threat to jeopardize the continued existence of the Southern Sea Otter. The Service has further stated, however, that the increased oil spill potential from subsequent development and production phases of OCS activity may endanger the sea otters' continued existence and that further consultation should be undertaken prior to any approval beyond the exploration stage. The State of California questions the basis of the finding which minimizes the risk of exploration related oil spills, but agrees that development and production phases do represent a higher oil spill risk and that specific measures must be undertaken immediately to ensure that when development is proposed, the threatened species will be adequately established in safe areas and sufficient information available to enable the USFWS to determine whether development and production activity would place the sea otter in jeopardy.

It is in the interest of the DOI and all lessees to ensure that proposed OCS development does not jeopardize the threatened sea otter and that the otter population increases sufficiently to be removed from the threatened species list. Therefore, it is appropriate that the following stipulation be included in all leases in the Santa Maria Basin:

Prior to any drilling activity or the construction or placement of any structure for exploration, the lessee shall in consultation with the DCMOFO, the Fish and Wildlife Service, the Governor of the State of California, and other lessees reach agreement reegarding their funding of USFWS commencement of study, implementation, and monitoring efforts designed to protect and enhance the Southern Sea Otter population and minimize the threat of extinction due to the effects of OCS oil and gas operations.

The elements of this program, designed to encourage protection and recovery of the species, shall include at least the following measures:

1) Updated and revised oil spill risk analysis of the present and historic range of the sea otter including:

a) risk to distinct coastline sectors from distinct spill sources, types and quantities of oil spilled;

b) seasonal differences and characteristics of spill behavior, weathering factors, containment and cleanup capability, etc.

2) Examination of acute and chronic effects of oil on sea otters, their food supply, and habitat, including food chain contamination;

3) Develop an oil spill contingency plan, including stockpile of equipment and supplies, designed to minimize otter mortality. Measures to be considered and evaluated include:

how (or should) otters be captured, transported, cleaned, rehabilitated.

4) Baseline and Monitoring Programs to include:

a) compilation of information by trained observers on population dynamics, structure and movements

b) evaluation of the historic range of the Southern Sea Otter to determine likely locations for establishment of new populations (e.g., Baja California, Southern California, Northern California, Oregon, Washington, British Columbia)

c) obtain and evaluate data on social organization and structure of the California sea otter population to determine the number, age, sex composition, capture site, and season best for successful translocation efforts

d) obtain baseline information on the biological and economic consequences of sea otters living in an area.

5) If establishment of an additional population is deemed necessary due to threats of oil contamination in present range and habitat, the lessees in consultation with the DCMOFO, USFWS, and the Governor of the State of California shall determine the appropriate funding mechanism to enable the FWS to undertake the following:

a) translocation to chosen site or sites

b) followup monitoring program to study translocated animals to determine the successful establishment of a viable population.

Stipulation No. 12

Seasonal Restrictions

a) This stipulation shall apply to leases for tracts 201-203, 207-210, 214-217, 221-224, 227-229, 232-243.

b) Drilling and workover operations shall not be permitted between December 1 and April 1 to minimize risk of oil spills during extreme weather conditions from tracts (1) adjacent to prime sea otter habitat, and (2) through which gray whale migrations occur.

c) Exceptions to this paragraph shall be granted by the DCMOFO only after a Biological Opinion, pursuant to Section 7 of the Endangered Species Act of 1973 as amended, prepared by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, has determined that such action will not jeopardize such populations.

Stipulation No. 13

Tideland Drainage Protection

a) This stipulation shall apply to tracts 203, 209, 210, 216, 217, 223, 224, 229-230, 234, 237-238, 241-243.

b) Pending a satisfactory resolution of a revenue sharing agreement under Section 8(g) of the OCSLAA with California, the DCMOFO shall not approve any drilling within one mile of the State Tideland Seaward Boundary.

State of California, Edmund G. Brown Jr., Governor
California Coastal Commission
631 Howard Street, 4th floor
San Francisco, California 94105
(415) 543-8555

March 23, 1981

The Honorable James Watt
Secretary of the Interior
Washington, D.C. 20240

Dear Secretary Watt:

The California Coastal Commission is dismayed to learn from your February 10, 1981 letter that you have decided to reinsert the four Northern California basins in OCS Lease Sale 53. Based on the extensive reviews and analysis conducted by this commission when this issue was before us previously, the Commission determined that the inclusion of the Eel River, Point Arena, Bodega and Santa Cruz basins in Lease Sale 53 would be inconsisent with the federally approved California Coastal Management Program. I intend to recommend whatever steps necessary to ensure that your Department complies with all requirements of federal law. Your action, if it becomes final, can only cause further delays to OCS development. In addition, your action substantially undermines the good working relationships California and its local governments have established with the federal government relative to the development of your offshore oil and gas resources.

The California Coastal Commission maintains that the final notice of sale is the key federal activity opening up thousands of acres of the outer continental shelf to oil and gas development and, as such, sets in motion a series of events which have significant consequences for California coastal resources. Accordingly it is the Commission's position that the Department of the Interior must submit a determination that the revised proposed notice of sale is consistent to the maximum extent practicable with the California Coastal Management Program, approved pursuant to the federal Coastal Zone Management Act (CZMA). The purpose of this letter is to formally request your sub-

mittal of a consistency determination for your action of February 10, 1981 which proposes to reinsert the four basins into Lease Sale 53.

In your letter you requested comments on the inclusion of the four basins in Lease Sale 53. This Commission has submitted detailed and focused comments on this issue. Please refer to the enclosed chronology which lists prior Commission action on this matter. In addition, we are once again preparing to take this matter to our Commission at its March 31, 1981 meeting. The Commission will again be asked to take a position on proposed Lease Sale 53 as revised. That action will merely consolidate our previous comments over the past two years. In those comments, we discussed, on a tract by tract basis, the appropriate basins and tracts which should be deleted. We also commented on the required stipulations for a determination that the proposed notice of sale for Lease Sale 53 is consistent with California's federally approved Coastal Management Program. These comments were intended to provide your staff with early notice of consistency problems of the proposed lease sale.

The Commission's comments are submitted under two separate federal laws. First, the Commission acts and comments as a state agency with an approved coastal management program under the CZMA. In this role, the comments advised your office that the four basins required a consistency determination. The Commission also explained why it found that the four tracts were *not* consistent with the approved Coastal Management Program. Second, the comments must be considered by you as part of the Governor's recommendtion under the federal Outer Continental Shelf Lands Act.

We also note that in addition to the federal Coastal Management Program administered by the California Coastal Commission, California's Coastal Management Program also includes a separate segment for San Francisco Bay, which is implemented by the San Francisco Bay Conservation and Development Commission (BCDC), BCDC has also previously submitted written comments. Since your action of February 10, 1981 anticipates that San Francisco Bay

will be a staging and service area for OCS development, your consistency determination must also analyze the San Francisco Bay segment of California's Coastal Management Program.

Sincerely,

/s/ Michael L. Fischer
MICHAEL L. FISCHER
Executive Director

MLF:LB:nc

cc: Governor Edmund G. Brown, Jr.
Senator Alan Cranston
Senator S.I. Hayakawa
Congressman Leon Panetta
Congressman Paul McCloskey
Congressman Tom Lantos
Congressman John Burton
Congressman Phillip Burton
Congressman Don Clausen
Congressman Paul McCloskey

CALIFORNIA COASTAL COMMISSION
631 Howard Street, San Francisco 94105—(415)543-8555

March 20, 1981

TO: STATE COMMISSIONERS
FROM: MICHAEL L. FISCHER
SUBJECT: STAFF RECOMMENDATION OF POSITION STATEMENT ON REVISED PROPOSED NOTICE OF SALE FOR OCS LEASE SALE #53 (For Commission consideration at the March 31-April 1 meeting in San Francisco)

ACTION: Unanimously Adopted by Commission, March 31, 1981

SUMMARY

The Department of Interior has issued a revised Proposed Notice of Sale for Outer Continental Shelf (OCS) Lease Sale #53 to offer federal waters offshore five areas of central and northern California to the oil industry to explore for and develop oil and gas (Exhibit 1). The original Proposed Notice of Sale, issued by former Secretary Andrus in October 1980, included only the Santa Maria Basin. The date of the sale, set for May 1981, has remained unchanged. Under the OCS Lands Act Amendments of 1978, the governor has 60 days to respond to the Revised Proposed Notice of Sale, or to April 11, 1981. The Secretary will make the final decision in late April.

Staff once again recommends that the Commission recommend to Interior that the four northern basins be deleted from the sale for the following reasons: 1) the low amount of resources in these areas, or about 20 percent of the total sale estimates; when balanced against the high risk to the environment and economy of the predominantly rural and lightly developed coastline; 2) the Chapter 3 policies of the California Coastal Management Program protecting marine and coastal resources, and the character of the coastline; and 3) the required balancing under the OCS Lands Act Amendments of 1978 between the national interest and the well-being of the citizens of the state. Staff recommends the Commission further recommend the deletion

of 31 tracts in the northern Santa Maria Basin, 129-155 and 158-161, to protect the threatened southern sea otter which breeds, pups, and feeds in this offshore area.

Interior is conducting Environmental Studies on the #53 area. Staff continues to recommend that Interior delay leasing until important studies already underway for that area can be completed and incorporated into decisions to offer certain tracts for lease. These studies are 1) oceanographic and meteorological study of Offshore California (winds and currents) necessary for accurately determining oil spill trajectories and conducting an oil spill risk analysis; 2) Coast guard study of Vessel Traffic and Port Access Routes along the state's coast; 3) Geohazards Study for the #53 area; 4) Marine Mammal and Seabird Study for #53 area; 5) Northern California Risk Assessment to Marine and Coastal Habitats; 6) Seabird Oil Behavior Study; and 7) Commercial and Sport Fisheries Oil Toxicity Study. Information from each of these studies should be applied on a tract-by-tract basis in the Santa Maria Basin to determine which tracts present the greatest potential for oil spills, vessel traffic conflicts, geologic hazards, and risk of oil reaching sensitive biological resources on or near shore.

Staff recommends that the Commission reaffirm its position that the proposed lease sale has a "direct effect" on the coastal zone and therefore requires a consistency determination by Interior as provided in the Coastal Zone Management Act. Also, the Commission should find that leasing of the four northern basins is not consistent with the California Coastal Management Program, as approved by Department of Commerce under the Coastal Mangement Act.

Staff further recommends that the Commission submit this recommendation as a part of the Governor's comments required under the Outer Continental Shelf Lands Act Amendments of 1978. Independent of the CZMA, the Commission's findings are part of the laws, goals, and policies of California.

Background. The Department of Interior is proposing to lease five geological basins offshore Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, San Luis Obispo and Santa Barbara Counties to the oil industry for oil and

gas development (Exhibit 1). The sale date is set for May 28, 1981. The Governor, the Commission, and all of the affected counties have commented extensively on this proposal to Interior, under both the Carter and the new Reagan administration, throughout the lease sale process. A chronology of the Commission's positions on the proposed sale is included in Appendix F. Briefly, the Commission, after public hearings, first recommended delay of the entire sale for at least two years, pending completion of the environmental studies on the sale area. If the sale were not delayed, the Commission recommended deletion or "negatively nominated" many areas for protection of seabird and marine mammal breeding and resting areas, elimination of conflict with vessel traffic, protection of areas of special scenic quality, and elimination of waters deeper than 2400 feet which are beyond the expected state of technology at the time of development.

Interior selected those tracts shown in Exhibit 1 for further study in an Environmental Impact Staement. The Commission held public hearing and commented on the Draft EIS to Interior, noting severe inadequacies in the oil spill analysis, in the failure to consider the five basin areas separately in the environmental analysis, and the general superficial and vague treatment of many of the key resource conflicts.

The publication of the Final Environmental Statement in September 1980 included an "addendum" in the front indicating new U.S. Geological Survey estimates of the petroleum resource estimates in the lease sale area. A new wave of protest from the state, the counties and the public arose. First, the revised estimates showed for the first time a likelihood that oil existed in the Eel River Basin offshore Humboldt County; Interior had never done an environmental analysis based on this information, rendering the EIS a legally deficient document. Now 80 percent of the oil and gas resources were believed by USGS to rest in the Santa Maria Basin. The estimates for the three middle basins had changed little. Second, a new opinion issued by the U.S. Fish and Wildlife Service about the same time as the FEIS revealed that OCS development could jeopardize the sur-

vival of the threatened southern sea otter and therefore that a new biological opinion would be needed at that time.

In response to past comments and these new developments, Secretary Andrus issued a Proposed Notice of Sale in October 1980 that deleted the four northern basins—the Eel River, Point Arena, Bodega, and Santa Cruz Basins. The Commission, in its response to that Notice, commended the Secretary for his decision, but also further recommended deletion of 31 tracts in the northern Santa Maria Basin to protect the sea otter and delay of sale of the remaining tracts in the basin until the crucial environmental studies on the area could be completed. The Commission restated its position that a decision to lease the four northern basins would result in a finding of inconsistency with the CCMP and in litigation against the Department of Interior.

With the change in administration, the new Secretary of the Interior has revised the Proposed Notice of Sale, reinstating the four northern basins into the sale but retaining the original sale date of May 1981. The Governor has 60 days, or until April 11, 1981, to respond to this Proposed Notice. The Commission is submitting comments both to the Governor as a state agency offering comments to be incorporated into an overall state package, and directly to Interior as the state's coastal management agency.

II. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following resolutions and findings on the revised Proposed Notice of Sale for Lease Sale #53 issued by Secretary Watt February 10, 1981:

A. Consistency of the Proposed Sale With California's Coastal Management Program (CCMP)

The Commission finds that the revised Proposed Notice of Sale issued by the Secretary of Interior to offer areas offshore the northern and central coast of California to the oil industry for exploration and development of oil and gas has a direct effect on the coastal zone and therefore requires Interior to issue a determination stating whether the project is consistent to the maximum extent practicable with the CCMP. The Commission also finds that, even if In-

terior issues a determination of consistency as the law requires, the proposed decision is *not* consistent with the CCMP to the maximum extent practicable.

To provide the Department of Interior with further information regarding the Commission's planning and permit responsibilities under the Coastal Zone Management Act and its federally approved Coastal Management Program (CCMP), the Commission has included a background section in Appendix A and incorporated this background section by reference into this recommendation.

Federal Coastal Zone Management Act. The Commission submits this recommendation to fulfill two obligations set forth in federal law. First, these comments are submitted as part of the Governor's recommendation according to the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), discussed in more detail in Appendix B. Second, the Commission submits this recommendation independently of the Governor's office according to the requirements of the approved coastal management program (CCMP) under the Coastal Zone Management Act (CZMA).

The Commission's recommendation under the CCMP concludes, based on findings in Section C, that Secretary Watt's action on February 10, 1981, of issuing a revised Proposed Notice of Sale that included the four northern California basins, is not consistent with the policies of Coastal Act as incorporated into the approved CCMP.

It is necessary to review the CZMA to understand the Commission's role in lease sale activities conducted by the Department of Interior. This review is included in Appendix C. Briefly, the Department of Commerce administers the CZMA and in November 1977 it approved California's Coastal Management Program (CCMP). The CCMP gave the state of California and thereby the Coastal Commission, the state's coastal management agency, a significant role in federal decisions that affect the coastal zone. Under Section 307(c)(1) and (2), if a federal activity directly affects the coastal zone, the federal agency must determine that the activity will be conducted in a manner consistent, to the maximum extent practicable, with the CCMP. Basically, the CCMP includes the Coastal Act and the Commission's

regulations. Thus, the federal activity is reviewed according to the regulatory development policies of Chapter 3 of the Coastal Act in the same manner as if the activity were a coastal development permit application.

The Commission has found the decision to offer tracts for lease in Sale #53 has a *direct effect* on the coastal zone and therefore requires Interior to submit a consistency determination to the Commission. There is serious disagreement between the Commission and the Department of Interior as to whether a decision to lease tracts activates the consistency provisions of the CZMA. Historically, Interior has taken the position that the CZMA does not apply to a decision to lease tracts on the OCS. The Commission has taken the position that the CZMA does apply to this type of activity and therefore requires a consistency determination from Interior. The Commission has fully articulated its position in Lease Sale #48 and requested mediation of this issue even though it had little substantive disagreement with the terms of the sale itself.

Commission's Position on Consistency of Lease Sale #53 and the Direct Effect on the Coastal Zone of a Decision to Lease. The Commission has found that a major decision offering massive offshore areas for oil and gas development, in this instance 1.3 million acres, has a direct effect of the coastal zone. It requires early resolution of use conflicts with fishing, shipping, agriculture, and recreation, and consideration of coastal dependent industrial uses in local land use plans *at this time.* For example, land uses onshore must provide for harbor facilities for vessels to serve offshore rigs, pipelines, related onshore industrial development, and relocation of incompatible uses, such as fishing or recreation. This is particularly true for the largely undeveloped Mendocino coast, Farallons, and Santa Cruz areas, which are currently zoned for exclusive agricultural use and will require major changes to existing zoning and planning to accommodate offshore oil development. A chronology of the Commission's position statements on this issue is attached in Appendix D.

In highlighting the nature of the effect of Interior's lease sale activities on the coastal zone, the Commission quotes

from Interior's own Bureau of Land Management (BLM) *Study Design for Resource Management Decisions: OCS Oil and Gas Development and the Environment*, October 1, 1978. At p. 2-1 of that document, OCS leasing activities are described as follows:

> The tentative scheduling of an areas for OCS leasing is a *major decision* in that it *establishes* the resource use conflict by identifying the potential new use (oil and gas extraction) that will possibly *conflict with present uses (fishing, recreation, transportation, etc.)*. Thus, in some instances studies to further define these potential resource use conflicts may be profitably undertaken prior to scheduling, or well before a Call for Nominations is issued for an area already scheduled.
>
> Stipulations, operating orders and tract deletion are the most prominent administrative mechanisms through which to apply environmental information. (Note: Stipulations are formulated and required at the lease sale stage.)

The comments quoted above clearly admit that Interior's decision to lease is a *major decision*, as the Commission has previously found.

Thus, as stated in full in the Position Paper incorporated by reference in Appendix D, the Commission finds that the decision to offer for lease 1.3 million acres in five off-shore areas must be considered a key decision of the Department requiring comprehensive, not later piecemeal, review of state policies and laws pursuant to the CZMA and OCSLAA. The final notice of lease sale provides the only opportunity for comprehensive review of the *cummulative* impacts of the federal decision. The decision establishes both the boundaries of the subdivision and the terms or conditions, (i.e., stipulations), under which later development will occur. It therefore sets in motion a chain of events from which there is no return. The lease sale represents the only stage in the entire process where tract selection and deletions can be made and specifies the conditions of development through lease sale stipulations. As such, it represents the federal government's master plan for development of petroleum resources. The controls specified at this time set the basic parameters of the contractual rela-

tionship between the companies and the Government. It therefore defines the reasonable expectations upon which companies will make economic judgments. To postpone a consistency determination which may affect later allowable locations of drill sites, air quality and other factors in production is particularly unfair to the companies who will be making their judgments based on the final notice of sale. It also ignores the important role given to state participation in both federal laws, the OCSLAA and CZMA. In conclusion, the Commission emphasizes that it is most critical to have the consistency determination made as early as possible. This will save the states, federal government, companies and the public from spending unnecessary time and effort on inappropriate tract development.

Scope of Consistency Review. Once the direct effect of a federal activity on the coastal zone is established, the next step is to determine if that effect is consistent with the state's CCMP. The CCMP includes the development policies of the Coastal Act and a consideration of the national interest that involves many issues in addition to our energy needs. As stated above, the standard for consistency of a federal agency's activity, if it directly affects the coastal zone, is "consistent to the maximum extent practicable." The CCMP uses the term"feasible" instead of "practicable" and defines the scope of feasibility to include technical, environmental, economic and social. This definition conforms with the broad view of the CCMP of "national interest" which includes not only energy production but recreation, production of food, preservation of life and property, aesthetic and conservation values, and interstate transportation. This would encompass possible use conflicts to be considered in Lease Sale #53 between OCS development and commercial fishing, prime agricultural lands, harbor facilities, national seashores and parks, areas of unique scenic value and marine sanctuaries, to mention a few major uses of the coastal area. Exhibit 3 is a table in the CCMP indicating policies of the Coastal Act that consider that national interest in all its aspects.

"Consistency", pursuant to the CZMA and the CCMP, in addition also includes the findings of other state regulatory

agencies even if such agencies themselves do not have an approved CCMP. This conclusion is based on the express terms of the Coastal Act and the CZMA as discussed and incorporated by reference in Appendix E. Thus, the Commission cannot find a federal activity "consistent" with the Coastal Act or the CCMP, if it is inconsistent with the regulatory program of other state agencies. Specifically, the Commission could not approve a federal project if that project failed to meet the air quality standards set by the State Air Resources Board. The ARB had pointed out that there are severe air quality impacts which cannot be mitigated by this federal activity. Based on those findings, the Commission concludes that the federal activity is also inconsistent with the Coastal Act and the CCMP.

B. Commission Record on Consistency Review of OCS Plans. The Commission finds that consistency review of a decision to lease is necessary, for the reasons stated above in Section A. Because of the Commission's past experience with consistency review of OCS Plans *after* a tract has been leased, the need for pre-lease review is essential to prevent needless conflicts and delays over developments on tracts that clearly could be identified before a lease sale as inappropriate for leasing under the CCMP.

Neither the Commission nor the State of California is opposed to the production of oil and gas in offshore waters. California is a pioneering state in offshore oil production both of its own state tidelands and in federal OCS waters. The Commission believes that its record on post-sale consistency review affirms this statement. A brief review of this record is contained in Exhibit 2. All of these exploration and development plans were located in Southern California, where an infrastructure to support such OCS activities already exists, such as service bases, processing facilities, pipecoating yards, and harbor facilities for the crew and supply boats. The OCS plans were on leases bought in Lease Sale #35, the Santa Barbara Channel sale, or Lease Sale #48. The first two sales occurred before the Coastal Act became effective. Concerning Lease Sale #48 tract plans, the Commission has approved all the Plans of Exploration that have come before it. These approvals fol-

low through with the Commission's statements that it had few substantive objections to Lease Sale #48, a lease sale that covered only Southern California where OCS infrastructure already exists. The presence or absence of offshore and onshore infrastructure is a critical, fundamental distinction between Lease Sales 35, 48, on the one hand and, Lease Sale 53, on the other hand. The Commission's objections to Lease Sale 53 cannot be resolved later at the plan of exploration stage because they involve such major concerns as the lack of onshore facilities, land, and population that can accommodate oil development. Therefore, one cannot look at the Commission's actions on the plans of exploration and development shown in Exhibit 2 as analogous to its predicted later actions on Lease Sale #53 plans of exploration and development. First, Lease #35 and the Santa Barbara Channel sale could not be viewed in terms of an overall leasing program since such a program did not exist at that time. Second, Lease Sale #53 includes areas of low energy resource potential, contrasted with the high potential and proven reserves in Southern California. Third, Lease Sale 53 includes rural, undeveloped coastline of national significance as a tourist, commercial fishing and agricultural resource. Its valleys produce crops for national economy. Its waters produce fish shipped to all parts of the world. Oil development would require massive reallocation of land uses that have not been previously considered. Therefore, Lease Sale 53 presents enormous concerns in planning and permitting functions not present in any other prior lease sale. The Commission has previously extensively documented these concerns and incorporates them by reference into its findings in Sections C 1-6. Briefly, however, there is a crucial need for a comprehensive review of the problems presented by the size, timing, and location of Lease Sale #53, a frontier area, before the sale takes place.

Despite the differences noted above, however, the Commission believes that its actions on the consistency reviews of the plans and exploration and development in southern California should nevertheless be instructive to Interior. For example, the Commission has established a policy through review of these plans that leasing within 6 nautical

miles of a sensitive marine mammal or seabird breeding area or within 500 yards of a Coast Guard-established Vessel Traffic Separation Scheme (VTSS) would be inconsistent with the CCMP. Both standards were developed in consultation with other federal and state agencies and in fact are derived from federal standards. These standards apply to southern California where offshore waters are calmer and do not pose the navigational hazards or oil spill cleanup and containment problems that will be present in Lease Sale #53 waters.

By noting standards involved in past lease sales, the Commission hopes that all parties will build on the Commission's prior decisions as experience in OCS leasing grows. To ignore the experience of the past, seems to this Commission a costly and time-consuming prospect in this time of national energy crisis.

Only one OCS Plan untimately failed to meet the Commission's criteria for consistency, Chevron's plan of Exploration for OCS Parcel 0205. The plan would have involved drilling an exploratory well within 5.7 miles of Anapaca Island where the endangered California Brown Pelican has its only breeding grounds in the state and within 500 yards of the VTSS in the Santa Barbara Channel. The Commission, after public hearings and lengthy discussion at two meetings, voted to object to Chevron's consistency certification. The Commission found that the risks of oil spill reaching the pelican breeding area could not be mitigated by changing the time of year in which the drilling would occur. Chevron did not appeal the objection and has decided not to drill the well. However, the objection did not block Chevron's plans to develop the oil field. Similar concerns occur in Lease Sale #53, as indicated in the following sections.

The Commission's record of consistency reviews of OCS plans and clear standards for objection has led several oil companies to modify the location of proposed activities, increase onsite oil spill containment and cleanup equipment, or otherwise modify their plans to conform to the CCMP. The Commission's positions have been consistent throughout this process and the Commission has sought to fulfill its

national interest obligations by giving precise guidance as to the areas where drilling is inappropriate. The Commission's standards for consistency can be applied with the same success at the pre-leasing stage to avoid leasing of tracts that cannot be explored or developed in a manner consistent with the CCMP. To lease tracts that the Commission has indicated cannot be developed consistent with the CCMP, such as a tract within 12 miles of the southern sea otter habitat, invites the probability of a Commission objection at the exploratory drilling stage, with lengthy delays if mediation or litigation follows.

C. *The Consistency of Lease Sale #53 with the CCMP.* The Commission finds that the revised Proposed Notice of Sale for Lease Sale #53 which includes five geologic basins offshore central and northern California (Exhibit 1) is not consistent with the state's federally approved coastal management program (CCMP). Specifically, the proposed leasing of the four northern basin areas would be inconsistent with Sections 30230, 30232, 30240, 30251, 30253, and 30260 of Chapter 3 of the Coastal Act and the national interest requirement in the CCMP. The following sections explain why each of these policies require the Commission to find the proposed sale of these basins inconsistent with the CCMP. The sections also explain why 31 tracts in the Santa Maria Basin should be deleted from the sale.

Secretary Watt has asked for additional comments on the proposed leasing of the four northern basins, claiming that the state never had the opportunity to do so. Appendix F is a chronology of comments from the Commission to Interior on Lease Sale #53. Exhibit 4 is a copy of the Secretary's letter to Governor Brown.

1. *Section 30230—Protection of Marine Resources.* The Commission finds that leasing within 6 nautical miles of existing or proposed marine sanctuaries or of marine resource areas indicated below, or within 12 miles of the range of the southern sea otter would not be consistent with the CCMP and would be contrary to the national interest.

The main part of the CCMP that addresses protection of marine resources is Section 30230 of the Coastal Act, which states:

Section 30230. Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological and economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species or marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Marine Sanctuaries. The OCS tracts being considered for Sale #53 include some areas within the boundaries of proposed and existing federal marine sanctuaries, clearly an expressed national interest (Exhibit 1). One alternative being considered for the Monterey Bay Sanctuary has a boundary extending offshore from Point Ano Nuevo south to Point Sur. A major purpose of these sanctuaries is to assure there are some ocean water areas offshore California where the clearly paramount use is for undisturbed and unthreatened feeding, resting, traveling and breeding of marine mammals and seabirds. All tracts within the boundaries of the Point Reyes-Farallon Islands Marine Sanctuary and the possible boundaries of the Monterey Bay Marine Sanctuary should be deleted from the Sale. Any leasing of these tracts would be inconsistent with the CCMP. The Commission also notes that the EIS shows comparatively high probabilities of oil spills from the Santa Maria Basin affecting San Miguel Island and Wilson and Richardson Rocks and surrounding waters. These areas are now incorporated in the Channel Islands National park or are within the boundaries of the Channel Islands Marine Sanctuary. These areas are well known for their breeding seabirds and marine mammals.

Other Marine Resource Areas. The entire Sale #53 area is frequented by migrating whales and by sea lions, harbor seals, elephant seals, and some rare fur seals. In 1978 the Commission identified key marine mammal and seabird breeding and resting areas in central and northern California and determined there should be no leasing within six miles of these areas. The Commission has repeatedly informed Interior of the sensitivity of the marine mammals and seabirds along the coast (See Appendix F). Many of

these areas remain threatened by prospective leasing. The Commission has found there should be no leasing to oil companies in the following areas: *Point Arena Basin* tracts within six miles of the Mendocino Coast from Elk Creek to Ten Mile River and within six miles of the coast from Point Arena to Gerstle Cove, including Arena rock, Seal Haul Rock, Saunder's Reef, Sea Lion Rocks, Haven's Neck and Fish Rocks; *Bodega Basin* tracts within the proposed marine sanctuary boundary; *Santa Cruz Basin* tracts within six miles of San Pedro Rock, Three Rocks, Eel Rocks, Seal Rocks, and the coast extending south from Point Ano Nuevo; and *Santa Maria Basin* tracts within six miles of Point Buchon, Morro Rock, Lion and Pecho Rocks, and the Nipomo Dunes. The Commission also has found that the California Sea Otter Range should be protected from oil spills and industrial disturbances. For further detail on the vulnerability of the southern sea otter and the need for a 12-mile buffer between the otter and any OCS development, Interior should refer to the Commission's comments of 11-21-80, 12-8-80, and 12-16-80, with its Addendum to Findings, incorporated herein by reference. Interior should also note the Biological Opinion prepared by the U.S. Fish and Wildlife for Sale #53 regarding the sea otter (see p. 5, Appendix F). Other federal agencies have expressed concern over some of these conflicts. For example, the National Oceanic and Atmospheric Administration, in its July 3, 1980 comments on the Draft Environmental Statement, states that 99 tracts should be deleted from the sale for conflict with the viability of marine mammals and commercial fisheries.

2. *Section 30232, Protection Against Spillage of Crude Oil* and *Section 30240, Environmentally Sensitive Habitat Areas.* The Commission finds that the state-of-the-art oil spill cleanup and containment equipment would not offer effective protection to resources in the four northern basins where oil would be transported by barge or tanker or in the sea otter range in the Santa Maria Basin where the risks to the threatened otter are high. The Commission further finds that it is not in the national interest to jeopardize the National Estuarine Sanctuary at Elkhorn Slough or the National Wildlife Refuge in Humbolt Bay. Further, other des-

ignated wetlands could not be leased in a manner consistent with the CCMP because of the frequent ineffectiveness of existing oil spill containment equipment.

Section 30232 of the Coastal Act expresses the policy of the CCMP to protect the resources of the coast from oil spills. It provides:

> Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

Similarly, Section 30240 mandates protection of environmentally sensitive habitats:

> *Section 30240.*
>
> (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.
>
> (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

The Secretarial Issue Document for Lease Sale #53 predicts that *4.25 oil spills* over 1000 barrels will occur somewhere in the 53 area over the life of oil production, or over about 20 years. These predictions may be seriously flawed due to 1) *inaccurate oil resource estimates*, especially in light of the increase in estimates that occurred with the publication of the Final Environmental Statement in which the spill estimates increased from 2.29 to 4.25; and 2) inaccurate data bases used for the predictions and for the spill trajectory models. Results of studies on physical oceanographic and meteorological data for the area are still not available.

However, regardless of the predictions, the state-of-the-art in oil spill containment and cleanup equipment does not provide for protection against spillage of oil and is not ef-

fective in containing oil in seas over six feet, currents exceeding one knot, and high winds.

Because of the deficiencies in oil spill control equipment and procedures, the Commission generally finds that the most effective way to prevent damage to sensitive and scenic coastal areas from oil spills is to prevent oil development and transportation near them in the first place. Therefore, in policy statements on lease sales, marine sanctuaries and in consistency determinations on OCS oil exploration and development plans, the Commission has determined that there should be no oil development within marine sanctuary boundaries, at least six miles of marine mammal and seabird breeding and resting areas and of other sensitive and valuable marine and coastal resources, and within 12 miles of the endangered sea otter.

Due to coastal tanker traffic, an oil spill risk already exists in the proposed sale area, with its several operating marine terminals. A large spill could damage the economic vitality of many of the Lease Sale #53 coastal areas which depend on commercial fishing and recreation for survival. A large spill in the Santa Maria Basin, where BLM predicts 3.25 large spills over the life of the producing fields, could jeopardize the entire population of the threatened southern sea otter, an unacceptable risk both under the CCMP and the Endangered Species Act.

Finally, much of the coastline in central and northern California is rocky with small coves or contains bays, marshes and esteros. It would be extremely difficult to clean up these areas and consequently they would sustain the heaviest damage to marine life for the longest time. A spill off Tomales Bay, approved for federal purchase, and Elkhorn Slough (a National Estuarine Sanctuary) for instance, would be nearly impossible to contain because of wind and wave conditions, and equally difficult to clean up once inside the bay. The mariculture industry in both and these wetlands would be destroyed for a number of years, and national interest in designation of an estuarine sanctuary thwarted. Other portions of the California coast adjacent to the four northern basins contain significant wet-

lands that should not be submitted to risks from OCS development:

The Coastal Commission finds that leasing within six miles of those designated environmentally sensitive habitat areas and marine resource areas cited in Section C.1 would be inconsistent with the CCMP policy of protection against the spillage of crude oil because of the ineffectiveness of containment and cleanup equipment in typical central and northern California sea conditions, and the value of these resources.

3. *Section 30251 Scenic and Visual Qualities.* The CCMP states that there is a national interest in the high scenic value of a coastal area. Leasing of tracts offshore in the Lost Coast (King Range National Recreation Area, Pt. Reyes National Seashore, the Golden Gate National Recreational Area) would not be in the national interest and therefore not consistent with the CCMP. Further, leasing of the four northern basins would affect the scenic quality of a substantial part of that coastline known for its beauty and therefore would not meet the policies of Section 30251.

Section 30251 of the Coastal Act is one expression of this policy:

> "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas to minimize the alternation of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting."

OCS development necessarily requires offshore platforms sometimes 100-feet high and associated onshore facilities which, under the Coastal Act, could not be permitted in areas of scenic and visual quality. The Commission's July 6, 1978 recommendation designated areas of special scenic quality that would be affected by Lease Sale 53: 1) Lost

Coast, which includes King Range National Conservation Area; 2) Mendocino headlands; 3) Pt. Reyes National Seashore; 4) Golden Gate National Recreation; and 5) San Mateo County coast. Any intruding industrial developments in these areas comprising a substantial portion of the coast in the northern four basins is rural and lightly developed, would be incompatible with protection of scenic and visual resources under the Coastal Act.

4. Section 30253 provides standards for new development concerning geologic hazards and air quality, among others. The pertinent subsections state:

> "new development shall: 1) Minimize risk to life and property in areas of high geologic, flood, and fire hazard. . . . . (3) be consistent with requirements imposed by local and air pollution control district or the State Air Resources Control Board as to each particular development.

The Commission, although it has consistency review in these two technical areas, has deferred to the expertise of the State Lands Commission and the Division of Mines and Geology for determination of geologic hazard areas, and to the Air Resources Control Board for air quality concerns. As was explained in the Air Quality discussion earlier, input from these agencies will be used by the Commission in reviewing the consistency of any proposed OCS plans, and is also being used now by the Governor in his comments to the Proposed Notice of Sale issued by Secretary Watt.

5. Section 30260. *Coastal Dependent Industrial Facilities.* The CCMP includes the following special policy for considering coastal-dependent industrial development, such as OCS oil and gas facilities that requires a balancing of environmental risks with the public welfare. Section 30260 provides:

> Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections

30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

Alternative locations. Oil fields do not have alternative locations, being naturally created. Therefore, alternative locations for OCS tracts are infeasible.

Mitigation. The second criterion for OCS development to be approved under Section 30260 is that adverse environmental effects must be mitigated to the maximum extent feasible, or "practicable" as the CZMP requires, discussed in Section A. Section C.2, on protection against oil spills, states that mitigation of spills is frequently not effective. The effective limit for cleanup and containment equipment is about six foot seas and a current of one knot, a sea state exceeded more than 50% of the time in central and northern California waters. Because the state of the art cannot offer better protection, mitigation of oil spill impacts would occur to the maximum extent feasible under existing technology.

Mitigation of adverse environmental effects is also possible through planning for OCS-related uses in the Local Coastal Programs—a process which is explained more fully in its relationship to OCS development in the next section. However, the onshore coastal area adjacent to lease sale #53 cannot accommodate OCS facilities in many areas without displacing or transforming other uses in the coastal zone. Therefore, the Commission finds that the maximum feasible mitigation of conflicts with other coastal uses can only be provided by deleting the four northern basins. This second criterion is therefore not met.

Public Welfare. Public welfare is analogous to the national interest as defined in the CCMP. Exhibit 3 from Chapter 11 of the CCMP shows that national interests include consideration not only of energy production but also recreation, production of food, transportation, preservation of life and property, and aesthetic and conservation values. Page 84 of the CCMP further describes how the national interest is considered in the Coastal Act:

Recognizing its responsibilities to the rest of the nation, California in its coastal planning has made every effort to consider the national interest in issues affecting the coast. The Coastal Management Program recognizes national defense and national security as important aspects of national interest, because without the attainment of these objectives all other goals and objectives can be threatened. The Central Act's policies on the protection of agricultural land and marine and wildlife habitat recognize the importance of California farm production and fisheries to the rest of the nation and also acknowledge the world food shortage. The policies calling for recreational and public oriented uses to have a high priority along the coast reflect the increasing popularity of the coast as a tourist destination.

The Coastal Act's energy and industrial development policies, especially important because of the increased interest and activities resulting from the Department of the Interior's leasing of Outer Continental Shelf (OCS) areas for petroleum exploration and extraction, take into account California's role in addressing national energy needs. The energy policies are based on a willingness to respond with a broader State role in meeting the nation's energy needs while, at the same time, properly planning for and protecting California's environmental, economic, and legal interests.

The Commission has recognized the need for California to contribute to the nation's energy supply through OCS development. It has supported and approved OCS lease sales and development projects in Southern California where petroleum resources are high and an infrastructure exists to support offshore oil development. (See Section B). Exhibit 2 shows the Commission's record in reviewing OCS plans for consistency. The CCMP also required the Commission to consider environmental, economic, and legal interest, as well as energy needs. Commercial fishing, tourism, recreation and agriculture industries along the coasts of the four northern basins could either be displaced by need for OCS-support facilities, such as harbor space for supply and crew boats and service bases, or damaged if an oil spill were to

occur. As stated above, if all five basins are leased, the Bureau of Land Management expects 4.25 oil spills of over 1000 barrels are to occur over the 20-year life of Lease Sale #53. This figure is over and above the existing risk of oil spills along the coast from tanker traffic and other sources.

The shipping industry would also be affected by OCS development: offshore structures, such as drilling vessels or platforms should not be located where they would conflict with existing or future-established vessel traffic routes. But, because there is no assurance that this would happen, conflict between these two uses of the OCS could result in rammings or collisions between the vessel and the offshore structure, possible resulting in either harm to life or property, and an oil spill, or both. The Coast Guard should complete its Vessel Traffic and Port Access Routes Study for the California coast before tracts are sold in northern and central California to allow for the safest possible traffic routes to be chosen.

The national interest has been expressed by the federal government in its designation of parks, wilderness areas, marine sanctuaries, estuarine sanctuaries and wildlife refuges. Exhibit 1 shows these national important areas. OCS developments that would pose a threat to the values of these areas would conflict with the national objectives of these programs on which millions of dollars have been spent in acquisition and maintenance. The federal Endangered Species Act also mandates federal protection of species designated as threatened or endangered by the U.S. Fish and Wildlife Service. As discussed above, the USF & W Biological Opinion on the proposed lease sale concludes that OCS development could jeopardize the survival of the threatened southern sea otter, requiring a second opinion if development occurs at a later date. There clearly is a decided national interest in protecting a federally designated threatened species.

Finally, the aesthetic and cultural value of the northern and central California coastline is a resource of national value. The areas mentioned in Section C.3 are of particular concern to the Commission where OCS development would be incompatible with the highly scenic character of the

coastline. The tourist and recreation industries thrive on the unspoiled, natural quality of the coast of most of northern and central California—a quality that would be compromised by the impacts of OCS development.

Conclusion. The Commission finds that the mitigation measures available do not adequately protect the natural resources and economic resources of the coastal zones in and adjacent to the four northern basins and the 31 tracts in the Santa Maria Basin. Oil spills cannot be adequately cannot maintain the existing character of the coastline. The national interest in terms of energy production from the amount of oil and gas that is expected to be produced in the four northern basins—20% of the total sale area—is far outweighed by the probable damage to all of the other national interests that could be adversely affected by OCS development activities and facilities. Therefore, the public welfare would be adversely affected by the Commission finding that leasing these four basins and 31 tracts are in the national interest and consistent with the CCMP.

6. *Local Coastal Land Use Planning.* All of the policies discussed above, i.e., marine resources, oil spills, environmentally sensitive habitats, scenic and visual qualities, are enforceable development policies applicable to the Commission's permit and *planning* functions. The discussion of each in previous sections emphasized the relationship of the policies to Commission permit or consistency decisions. It must be emphasized in this secton, that the Commission planning functions as well as its permit functions, also apply these same policies. In addition, CZMA mandates the Commission to consider the national interest in planning and siting energy facilities either in, or which may significantly affect the coastal zone, and to develop a planning process for anticipating and managing the facilities (Section 306(e)(2) and 305(f)(8) of the CZMA).

The Commission's planning program is briefly described in Appendix G. The Commission's certification responsibility for local coastal programs requires it to review and approve the land use plans and zoning for 63 local governments by June 1981. At that time, the six regional Coastal Commissions cease to function in anticipation of the as-

sumption of significant permit responsibilities by local governments. To date, 32 land use plans have been certified. In the ideal world, this comprehensive statewide planning process would have access to and therefore developed sufficient information to allow the appropriate siting, i.e., zoning of land areas for industrial, energy and support facilities. The land use plans are required to designate priority land uses in the coastal zone. Priority uses include coastal dependent industrial uses as well as agriculture and visitor-serving commercial uses.

The land use plan must consider "anticipated" energy development. The Commission has made a concerted effort to implement an energy facility siting process by adopting criteria for local government to consider in local plans. Because the existing land uses are largely rural and undeveloped in the four basins that Secretary Watt proposes to include in Lease Sale #53, onshore energy facilities will involve significant changes on planning.

The Commission is repeatedly told by the companies involved in OCS exploration and development that they cannot determine the types and location of facilities which are needed onshore before offshore tracts are leased and exploration takes place. Thus, neither the companies nor the Department of Interior has provided the Commission or local governments with sufficiently detailed information to allow the Commission to prepare for the onshore impacts through specifying the location, kinds, and intensity of coastal dependent industrial uses in the Local Coastal Program. Secretary Watt's action exacerbates the problem by putting back four basins covering approximately 700 linear miles in California coastline, located offshore of county and city LCP planning jurisdictions that had not been planning for OCS development. Programs for several of these areas (e.g., Santa Cruz, Monterey, Humboldt) are in the local hearing process. Others have been approved by the Commission (e.g., San Mateo County and Marin County).

The need to certify onshore land uses "now" puts the Commission in a Catch-22 situation. It is impossible for the Commission and local governments to formulate rules and conditions for onshore oil development in the local coastal

programs if they are not told of the onshore expectations of offshore development.

To sum up, the size and indefinite scope of the lease sale presents enormous planning problems for the state. As far back as July 1978, the Commission submitted detailed basin by basin comments on the size, timing, and location of Lease Sale 53. The Commission has often described the existing land uses. The Commission repeats that land uses in central and northern California, with the exception of San Francisco Bay, have relatively no existing industrial infrastructure which could accommodate offshore oil development. In addition, existing and projected land uses are incompatible with industrial development. The existing land uses, for example, agriculture in Monterey County, provide not only the *economic* foundation of the local area, but also food stuffs exported through out the country. The Commission takes this opportunity to remind Secretary Watt of its express concerns of the appropriateness of including the four central and northern California basins within Lease Sale #53. The Commission hereby incorporates by reference its previous detailed basin by basin comments as recommendations on timing and location of lease sale activities pursuant to OCSLAA and, independently as recommendations pursuant to the consistency requirements of the CZMA.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

APRIL 28, 1981

Mr. Michael L. Fischer
Director, California Coastal Commisson
631 Howard Street, 4th Floor
San Francisco, California 94105

Dear Mr. Fischer:

We have received your letter of March 23, 1981, regarding OCS oil and gas Lease Sale 53. You indicated that the purpose of the letter is to formally request the Interior Department to submit a consistency determination for the Secretary's action of February 10, 1981, which proposes to reinsert the four northern basins into Lease Sale 53. You also note that the action of February 10, 1981 anticipates that San Francisco Bay will be a staging and service area for OCS development and thus the San Francisco Bay segment of the California Coastal Management Program must also be analyzed in the consistency determination you are requesting.

We indicated to you in the Department's determination of October 22, 1980, that none of the stipulations anticipated for Lease Sale 53 are expected to directly affect the coastal zone. We also indicated that the Secretary's decision to issue the Final Notice of Sale for the Central and Northern California OCS Sale will identify exactly which tracts will be offered for sale. We stated that this decision is not an activity directly affecting the coastal zone because no changes to coastal resources or physical impacts on the coastal zone are possible without subsequent decisions and actions. In sum, we stated that we have assessed the possible effects of the Department's pre-lease activities associated with Sale 53 and found that none of the activities directly affects the California Coastal Zone.

We believe that the October 22, 1980 letter satisfies our obligations regarding Lease Sale 53 under Section 307(c)(1) of the CZMA and the implementing regulations—15 CFR

930. It is therefore our opinion that your March 23, 1981 request for a determination has already been met. As you know, the 15 CFR 930 regulations do not require us to analyze a State coastal zone management program nor any of its segments to assess the consistency of the Federal activity unless we find that the activity would directly affect the coastal zone. Consequently, we do not believe an analysis of the San Francisco Bay segment for the purposes you indicate is required.

We also would like to thank you for your letter of April 8, 1981, restating the California Coastal Commission (CCC) position on Lease Sale 53. The Secretary will consider your views in making future decisions on this Sale. The letter included an expresssion of CCC's interest in two upcoming Commerce Department rule-making efforts—one dealing with the regulations governing two marine sanctuaries off California and one with clarification of the Section 307(c)(1) federal consistency term—"directly affecting". We look forward to the rule-making and the resolution it will provide to the "directly affecting" issue.

Sincerely

By Moody R. Tidwell
MOODY R. TIDWELL
Deputy Solicitor

cc: Secretary's RF (2)
A/S PBA (2)
Stang, Sant (2), Ross
Elliott

PPA/PStang:jg:4/22/81

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAY 1, 1981

Honorable Edmund G. Brown, Jr.
Governor of California
Sacramento, California 95814

Dear Governor Brown:

After extensive examination of information relating to the proposed notice of sale issued last October on OCS offering #53, including the comments and recommendations in your letter of December 24, 1980, we have decided to offer for lease this month the 115 blocks in the Santa Maria basin. We made this decision based on what we found to be national benefits far outweighing the potential for harm to the well-being of the citizens of California.

No decision has been made yet on the other four basins proposed as a part of offering #53. Your comments on the size, timing, and location of the leasing activity proposed in February were recently received, and they will be given thorough analysis and consideration. A decision on the second part of the sale, and whether or not a reasonable balance of national and State interest calls for the leasing of all or part of these basins, will be made in late May or June.

Extensive consultations have occurred with all interests in the Department of the Interior. Professionals from all Interior agencies involved in the OCS sale decisions, including the biological scientists in the United States Fish and Wildlife Service, continue to recommend that the entire basin be leased for exploration.

We have considered the recommendations which you made by letter of December 24, 1980, on the size, timing and location of leases to be offered in the Santa Maria Basin. In each instance we have weighed, on the one hand, the effects on the national interest and, on the other, the effects on the well-being of the citizens of California that would result from acceptance of your recommendations. We approached this balancing of interests in the context of the legislated mandate of the OCS program and its specific ap-

plication to the case of offering #53. Our thinking on these matters is contained in Enclosure 1. The mission of the program as established by Congress constitutes a strong mandate to proceed with offshore leasing wherever this can be safely done. The excellent operating record of the program provides a strong climate of confidence that we can proceed safely.

Within this context we have tried to evaluate your specific recommendations on size, timing and location. We have attempted to do this with as much rigor as possible, recognizing that both the nation's interest and the State's well-being involve intangible values that do not lend themselves to readily-available or easily-agreed-upon measurement. Nevertheless, because the statute calls for a reasonable balancing to be performed, we have tried to examine and array the orders of magnitude of value which are at stake as best we can. A paper describing the approach we used in this effort is included in Enclosure 2.

With this and other information in mind, we have decided not to accept your recommendations on size, timing and location because we have determined that they do not provide for a reasonable balance between the national interest and the well-being of the citizens of California. An approach we used to help us in reaching this balancing determination is described in an attachment to this letter.

Our initial purpose in offering these tracts is to permit exploration so that the potential oil and gas reserves, if any, can be inventoried. As you are aware millions of dollars have already been spent on environmental studies in preparation for this offering. Later, should recoverable resources be identified, the OCS Lands Act would require further environmental documentation and safeguards.

Accepting your recommendatons would mean the loss of potential resources for the nation which far outweigh any harm that might potentially accrue to California.

OCS exploration in the Santa Maria area will be undertaken with careful controls designed to maintain a high standard of environmental protection. The notice of sale incorporates, in the "Notice of Lessees" section, language notifying lessees that shallow gas deposits may occur on cer-

tain tracts and that special care will have to be taken there. Also, that section of the notice advises lessees that the training program required by stipulation no. 8 will require familiarization training regarding marine birds and mammals for persons working on the project.

Your extensive and timely participation in the lengthy planning and preparation activities for this offering are very much appreciated. We intend to make the fullest possible use of the comprehensive set of safeguards available to us under the law to protect the valuable marine and coastal resources of California.

Sincerely,

/s/ James Watt

JAMES WATT
Secretary

2 Enclosures

OCS PROGRAM MANDATE AND SALE 53

The Outer Continental Shelf Lands Act, as amended, places on the Federal Government an affirmative responsibility to obtain for the public the benefits of oil and gas resources located on the U.S. continental shelf. Those resources are to "be made available for expeditious and orderly development, subject to environmental safeguards," in order to "achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorble balance of payments in world trade."

The law envisages that all areas with oil and gas potential will contribute to the Nation's energy supplies. It calls for "an equitable sharing of developmental benefits and environmental risks among the various regions," and establishes a comprehensive framework of regulatory controls to assure that activity proceeds safely in those regions. The statute indicates that the Congress expected that environmental protection could be achieved through sound planning and operating practices provided for in the amended law, and would not require geographic areas to be closed to leasing, exploration and development.

The Congress' confidence in the program and in its own handiwork was not misplaced. Offshore oil and gas activities have had an excellent environmental record in recent years. While there are over 2000 currently producing offshore wells, since 1970 only two spills of greater than 1,000 barrels (1/9/73-9,935 barrels; 11/23/79—1,500 barrels) have occurred from offshore platforms. Both of these were spills of stored oil, not loss of well control. Before that, Santa Barbara blew 77,000 barrels in 1969—the largest U.S. platform spill. The Mexican spill at Ixtoc last year was, we believe, far larger but may have occurred through operating procedures which would not be used in U.S. waters. Our marine scientists report that there have been no significant, long-term damages to the marine resources as a result of either of these spills. Except for the Ixtoc spill, the offshore drilling performance is dramatically better than

that of tankers under foreign registry, the alternative source of oil which OCS production can displace. The Argo Merchant, for example, spilled 183,000 barrels of #6 fuel oil, much more toxic than crude oil, off New England in 1976.

In addition to being environmentally superior to tankered imports, offshore production is also a tremendous boon to the Nation's economy and security. It costs less to produce than the OPEC price, and the differential is returned to the public in government revenue. National income is increased, the balance of trade improved, and the dollar strengthened in international markets. The risk of severe economic shock from another embargo (or further price run-up) is reduced. National security is enhanced, as well as U.S. foreign policy flexibility and stature.

The controversy over offshore leasing is the classic problem of public interest versus local interest. All Americans have a positive stake in this national program. However, among the parties to individual sale decisions, local and state concerns do not reflect this overriding national need or perspective. Nearby OCS activity does not change the availability or the price of oil supplies in the region. Since all the government revenue goes into the Federal treasury, no state has much to gain from leasing, unless it wants additional development and jobs in its coastal zone. Few states do. On the other hand, there are some industrial-type facilities which will accompany offshore development and these are not always coveted neighbors. There is also some modest risk of conflict with other ocean uses, such as fishing, and of environmental damage from, for example, an oil spill, the probability of which cannot be reduced to zero. This situation is a blueprint for local opposition, and indeed the OCS program off the lower 48 states is now down to the politically toughest areas to handle—New England, where no exploration has ever occurred although a first-ever lease sale was held in 1979, and Central and Northern California, where no leasing has occurred since a sale in the 1960's which yielded evidence of oil and gas but no commercial find.

The Congress recognized the State interest in OCS leasing and the likelihood that the State view would differ from the Federal. It directed the Federal Government to assist states by providing timely information for planning, and to consult with states and provide them an opportunity to review, comment on, and participate in decisions. It did not, however, assign any decision authority to the States.

Regarding lease sale proposals, the statute reads:

> The Secretary shall accept recommendations of the Governor ..., if he determines ... that they provide for a reasonable balance between the national interest and the well being of the citizens of the affected State.

This balance of interests, on the merits, seems to come out overwhelmingly for proceeding to explore, and if discoveries are made, to develop the OCS. The value of the oil and gas (in both monetary and national interest terms) appears greatly to exceed the limited risks of development. This basic reality is not palatable to some states, and their strenuous objections have caused political decisions to be made in the past that delayed entry into some areas. Those areas have been rescheduled and the political struggle resumed.

Sale 53 is the current case in point. It has been scheduled and delayed many times, and the Northern California coast is now the last promising lower 48 area to have had no leasing and exploration since the 1973 embargo.

California argues that the risks are too great for the amount of oil to be found. This is false.

—The risks are limited, as has been discussed extensively in environmental statements, correspondence with California, and numerous other documents for Sale 53. The natural resources of the area are unique and valuable but are they more worthy of protection than those of other areas of the U.S. OCS?

—There is a U.S.G.S. estimate, which is simply a best guess. The estimate is for 242 tracts which sit atop 5 basins of much more substantial size. These tracts are a first, exploratory step toward possible broader activity which may be of much greater value if a real find is made.

—The resources estimated by the U.S. Geological Survey to be present in the 5 proposed lease areas would be worth $42 billion at today's prices.

—Whatever resource is ultimately found, the Congressional OCS mandate directs the Federal Government to "insure that the extent of oil and natural gas resources . . . is assessed at the earliest practical time."

—Oil spill risk varies directly with the amount of oil handled. If limited oil is found, the potential for environmental damage from a spill declines proportionately.

—Domestic oil and gas supply is principally the aggregate of production from a large number of small fields. Each producation site makes a valuable contribution.

APPROACH TO DETERMINATION OF REASONABLE BALANCE UNDER SECTION 19 OF THE OCS LANDS ACT

Section 19 of the OCS Lands Act Amendments of 1978 requires the Secretary to accept recommendations regarding the size, timing or location of a proposed lease sale from the Governor of a coastal state if the Secretary determines "that the recommendations provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state."

California's recommendations on the size, timing and location of OCS Sale 53 pertaining to the Santa Maria basin were submitted to Interior on December 24, 1980.

The recommendations were:

(1) Delete 34 tracts (129-155 and 158-164)

(2) Delay the Sale until seven ongoing studies are completed. The current schedule indicates completion of these studies in October, 1983.

The reasonable balance determination of Section 19 highlights issues that arise in OCS oil and gas leasing because the benefits and costs of OCS development are not distributed in the same proportion throughout the Nation. The net economic benefits of OCS development are substantial, but, because they are captured primarily in the form of federal revenues, they accrue to the Nation as a whole. Citizens of affected coastal states receive a share of these benefits in the form of federal funds and services. Based on an alloca-

tion proportional to California's share of Federal tax payments, Californians receive about 12% of the net national economic benefits of OCS development. However, because the OCS contribution to federal revenues is subsumed within the much larger total federal budget, subunits of the population, such as the citizens of California, generally do not perceive their share in OCS benefits. On the other hand, the costs of greatest concern, the potential adverse environmental effects, particularly from oil spills, fall and are generally seen as falling primarily upon the citizens of affected coastal states. A decision regarding a Governor's recommendations on size, timing and location of OCS lease sales thus requires careful consideration of the way in which implementation of those recommendations would affect the magnitude and distribution of the benefits and costs of the proposed leases.

From the national perspective, the decision to lease a set of tracts is based on a judgment that the gains to the Nation outweigh the losses. More specifically, the gains from OCS development include the net income produced (the production revenues less the actual costs of exploration, development and production), the gains in national security and decreased vulnerability to import disruption, and the environmental gains of reduced tankering of imported oil, particularly in ships of foreign registry that have poorer safety and oil spill records. The national losses include the expected adverse environmental effects including oil spills and other discharges into coastal waters, losses in aesthetic and recreational values, losses in wildlife and fisheries productivity and air pollution. It is in the national interest to proceed with leasing a set of tracts if the value of these losses is not expected to be as great as the gains.

In considering a Governor's recommendation not to lease a set of tracts, the national interest is to be balanced with the well-being of the citizens of the State. The tracts should be leased if the net gain to the national interest is greater than the net loss to the citizens of the State. The Governor's recommendation should be accepted if the net gain to the national interest is less than the net loss to the State.

The net gain in the national interest is the net income expected to be generated by the development less the expected damages. The net loss to the citizens of the State is the difference between the expected damages falling on citizens of the State, and their share of the national benefits. However, because the OCS Lands Act as amended provides compensation mechanisms for two important types of damages, oil spill pollution and damage to fishing gear, the value of damages to the State must be reduced by the amount of the expected compensation. Since there is as yet little case history for use of these compensation mechanisms, the percentage of environmental damages which will be compensated is not known.* However, in the case of both mechanisms, the compensation provided for is comprehensive and essentially without financial limit. It can be expected to offset well over half of the damages sustained.

Governor Brown has recommended deleting 34 tracts in the Santa Maria basin. In order to help simplify the balancing of the national interest with the well-being of the citizens of California, the following assumptions were made which greatly favor California's side of the balance:

1) all of the expected national losses in terms of damages associated with exploration, development and production of the 34 tracts will be borne by Californians.
2) there will be no compensation for these damages given to Californians from the Oil Spill Pollution or Fisherman's Contingency funds or any other federal compensation,
3) the national interest gains will include the value of net national income, but no estimate of gains in national security or reduced tanker spills.

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*Note that the compensation of State citizens reduces the net losses they experience but does not change the balance from the national perspective. This is because the compensation is merely a transfer payment that redistributes wealth from one part of the nation to another part. Such a transfer payment does not change the fact that whatever environmental damages occur reduce the well-being of all citizens in the nation.

The net national income from development of the resources on 34 tracts is the gross production revenues less the costs of exploration, development and production. The U.S.G.S. estimates that the 34 tracts contain an expected level of recoverable resources of 78 million barrels of oil equivalent. This is only a best guess, with a wide margin of error, and cannot be validated or corrected without exploratory drilling. At $35 per barrel, the estimated production of 78 million barrels of oil equivalent would yield $2730 million in gross production revenue. Allowing for higher prices expected during the production phase, the production value is estimated to be $3475 million. Since the 78 million barrel estimate is the "risked" or expected level of recoverable resources (that is, it reflects the small chance of finding oil or gas on each prospect), $3475 million is the expected gross value of the production from the 34 tracts in question. Costs for these 34 tracts are estimated to be about $1675 million. To estimate the net national income contributed by these tracts, the difference between production revenues and costs is calculated and discounted to present value to reflect the fact that a substantial portion of the costs occurs in early years while production revenues occur in later years. Discounting is necessary to account for the effects on the productivity of the economy of having valuable resources available at earlier times. The expected net national income from the 34 tracts discounted to the present time at 8% is estimated to be about $546 million.

Thus, the question to be asked in balancing the national interest and the well-being of Californians for these 34 tracts is: Do the...

[nation's gains] minus [its losses] equal [California's losses] minus [its gains]?

That is, do the...

[national interest gains] minus [expected damages] equal [expected damages] minus [California's 12% share of the national interest gains]?

To be more specific, we can use our best estimates of the national income produced from the 34 tracts. The question then becomes does...

$546 million − expected damages = expected damages − $66 million?

If expected damages in present value terms $306 million, the two sides are equal and the decision to lease or not to

lease, is a toss-up. If the expected damages are considerably more than $306 million, Governor Brown's recommendation to delete the 34 tracts clearly should be accepted. If the expected damages are considerably less, it clearly should not. If Californians are compensated for half the damages they bear, a conservative estmate, this balance point would be $408 million rather than $306 million.

The determination of reasonable balance thus turns on judgment about whether the value of the expected damages is sufficient to reach this balance point. Since the damages of a large oil spill pose potentially the greatest single source of harm and are dominant in public concerns regarding OCS development, it is useful to consider how the expected damages from OCS oil spills from development of these 34 tracts compare with the damages required to tip the balance. While it is difficult to estimate expected damages from leasing particular tracts, an upper bound can be estimated.

While there are over 2000 currently producing offshore wells, since 1970 only two spills of greater than 1,000 barrels have occurred from offshore platforms (1/9/73—9,935 barrels; 11/23/79—1,500 barrels). Both of these were spills of stored oil, not loss of well control. Before that, a tract in the Santa Barbara Channel spilled 77,000 barrels in 1969—the largest U.S. platform spill. The Mexican spill at Ixtoc was far larger, but may have occurred through operating procedures which would not been used in U.S. waters.

A 1970 study of the 77,000 barrel oil spill in Santa Barbara placed the measurable costs at $16.4 million. Using this information and other historical data on platform and pipeline spills, a rough estimate of the expected cost of measurable damage from major spills can be calculated.

Recent U.S. Geological Survey data indicate that 2.1 spills greater than 1000 barrels are expected from production platforms for every 1 billion barrels produced. USGS also estimates that transporting oil by pipeline would result in 1.8 such spills for every billion barrels.

The mean size of the nine large recorded United States OCS platform spills and of the eight recorded U.S. OCS

pipeline spills since 1964 is 21,000 and 26,000 barrels respectively. Informal communications with National Oceanic and Atmospheric Administration (NOAA) staff indicate that the measurable cost of damages from these spills in 1981 dollars ranges, in a manner roughly inverse with spill size, between $42 and $420/barrel ($1-10/gal), and averages about $160/barrel ($4/gal). These communications also indicate that recent data on the 1978 Amoco Cadiz spill are expected to place the measurable cost at under $126/barrel ($3/gal).

By assuming the measurable cost of $500/barrel (slightly higher than NOAA staff's informal estimate of the highest cost/barrel of past large spills) and using the risked mean estimate of the expected recoverable oil resources (63 million barrels for the 34 tracts*), a crude estimate of the expected cost of measurable damage from platform and pipeline spills over 1000 barrels can be calculated to be approximately $3 million. This is calculated by multiplying the expected spills per billion barrels of production, the expected production in barrels from the 34 tracts, the mean historic spill size in barrels, and $500 per barrel for both platforms and pipelines.

However, allowance should be made for the fact that the oil spill damages are, like production revenues, primarily a downstream effect. Discounting the expected oil spill damages to present value is necessary to make them comparable to discounted expected net income. Although the likelihood of spills is roughly proportional to the amount of production in a given year, it was assumed for this discounting that all expected spill damages occur in the year of first production 1986. Discounting at 8% for 5 years reduces this expected value to $2 million.

Thus, if the expected measurable damages from spills over 1000 barrels is about $2 million, the balance of the expected damages resulting from any error in the above

*Note that the previous estimate of 78 million barrels of oil equivalent included this expected oil production of 63 million barrels plus 90 billion cubic feet of gas production converted to its oil equivalent on a Btu basis.

calcuation*, expected spills of 1000 barrels or less, the value of the immeasurable damages from oil spills and all other causes related to oil and gas development would have to be $304 million in order for the balancing decision to be a toss-up.

A detailed review has been made of the possible damages discussed in the Final Environmental Impact Statement and in the correspondence provided by the Governor and the various agencies of the State of California. In most cases, it has not been possible to estimate these impacts in quantifiable terms, nor to measure their value monetarily. Many of these potential damages affect highly varied intangible values for which there is no common measure. Nevertheless, the reasonable balance determination set forth in Sec.19 requires that some thoughtful judgment be made about their relative weight. The FEIS and related documents assemble the available information on these potential damages in a useful form for these purposes. These documents in many cases do not attempt to put a quantitative measure on the potential damages avoided by accepting California's recommendations. However the information which is presented does not support the conclusion that the damages in question are major. For example, they are modest compared to the damages of an oil spill exceeding 1000 barrels. In those cases where the magnitude of foregone damages is expressed, the terms used denote a small magnitude—e.g., "relatively minor," "insignificant." A matrix is attached that organizes the judgements drawn from the FEIS material, along with the national income and oil spill estimates above, into a format that facilitates the balancing determination.

Review of this information supports the judgement that damages other than major oil spills are not of sufficient value to be close to $304 million and that the total of the ex-

*It is important to recognize that the relative magnitudes of both the gains and the losses depend on the actual amount of oil and gas produced. More resources than estimated would mean greater gains as well as greater potential losses. On the other hand if the resources discovered turn out to be minimal, then the expected damages will also be minimal.

pected damages is not close to $306 million. Consequently, the recommendation to delete the 34 tracts in the Santa Maria basin from Lease Sale 53 does not provide for a reasonable balance between the national interest and the well-being of the citizens of California and therefore need not and should not be accepted.

Similar considerations are involved in balancing the national interest with the well-being of the citizens of California for the recommendation to delay the sale of all Santa Maria tracts. Accepting this recommendation would necessitate delaying receipt of the national income from development of an estimated 969 million barrels of oil equivalent for 2½ years. Using the same approach as that used for the 34 tracts above, this national income is estimated to be $6.3 billion. To calculate the cost to the nation of postponing this income, the production revenues are recalculated on the basis of the higher prices expected at this later time. This increases the gross value of production by about 5%. Then the costs are subtracted to get net income and the result is discounted to present value at 8% per year. Because the discounting is for 2½ years more than the discounting to get the present value for the net income from a sale held as scheduled, the net income from delayed development, even at higher prices, is less than from the sale as scheduled. The cost to the nation from the delay, as measured by this difference, is $464 million, which includes a cost of Californians of $56 million (12% of $464 million).

Some Californians who oppose leasing of the Santa Maria tracts may feel that delay, in itself, is beneficial. A gain would result from delaying any damages from oil spills that might result. A 2½ year delay in the expected damages from oil spills would reduce their present value by about 18%. Since the expected oil production from the entire sale is about 12.5 times that from the 34 northern tracts, the expected oil spill damages from the sale are about $25 million. The 2½ year delay reduces the present value of these damages by about $5 million.

Delay for the purposes of completing these studies is not likely to result in other gains to the citizens of California approaching the $459 million remaining to tip the balance.

The incremental value achieved in leasing decisions by using more information about the the non-hydrocarbon resources in the area is extremely limited given that extensive information about these resources has already been assembled and the risk to those resources is low, especially during the exploration stage. The information from the seven ongoing studies, to the extent that it has value for offshore oil and gas decisionmaking, will be available for development and production decisions since the studies will be completed before any of these activities begin. Any data generated by the studies, beyond that already provided in interim reports, can be considered and used by federal and state agencies in carrying out their responsibilities related to OCS development and production. The recommendation to delay the sale thus does not provide for a reasonable balance between the national interest and the well-being of the citizens of California and need not and should not be accepted.

MATRIX OF GAINS AND LOSSES TO THE CITIZENS OF CALIFORNIA AND THE NATIONAL INTEREST TO BE USED IN DETERMINING "REASONABLE BALANCE" REGARDING GOVERNOR BROWN'S RECOMMENDATIONS ON OCS SALE 53

Criteria for:	*Recommendations* Delete 34 Santa Maria Tracts	Delay the Sale of all Santa Maria Tracts
National Interest Losses		
—Oil and gas production	78 million barrels	delay only
—Value of production	$3.5 billion	delay only
—Income less the cost of mitigation	$546 million less cost of mitigation	$464 million[1]
—Reduced costs of clean-up and costs of lost resources from oil spills during tankering of imported oil	not estimated	not estimated
National Interest Gains		
—Reduction in OCS oil spilled	5700 barrels	delay only
—Reduction in oil spill damages	$2 million	$5 million
—Reductions in aesthetic and lifestyle losses	improved (4-194)[2]	relatively minor
—Reductions in wildlife damages	reduced impacts (4-194)	major effects not expected
—Reductions in damages to fishing gear	reduced conflicts (4-194)	small (2-6)
—Reduction in losses of fishing profits not included above	small[3]	small (2-6)
—Reduction in water quality declines	improved (4-194)	insignificant (2-2, 2-3)

[1] This represents the cost of delaying receipt of national income for two and a half years.

[2] Numbers in parentheses are the relevant pages of the EIS. Note also that the conclusion about the 34 tracts deletion option were derived from FEIS Alternative 8, which was a sea otter oriented deletion of 6 tracts with stringent stipulations imposed on 10 other tracts. Conclusions reached on a direct examination of the 34 tract alternative would be similar.

[3] The words small and very small reflect judgments based on information in the FEIS when a specific conclusion of characterization was not expressly related to the FEIS. The words indicate the magnitude of the effect relative to the level of national income.

—Reduction in air quality declines	emissions slightly reduced (4-194)	not significant (2-1)
—Reduction in environmental	small	small (2-9)
	Delete 34 Santa Maria Tracts	Delay the Sale of all Santa Maria Tracts
State Well-Being Gains		
—Reductions in OCS oil spilled	5700 barrels	delay only
—Reductions in uncompensated oil spill damages	$2 million less compensation	$5 million less compensation
—Reduction in aesthetic and lifestyle losses	improved (4-194)	relatively minor
—Reduction in wildlife damages	reduced impacts (4-194)	major effects not expected
—Reductions in uncompensated damages to fishing gear	reduced conflicts (4-194)	very small (2-6)
—Reduction in losses of fishing profits not included above	small (4-194)	small (2-6)
—Reduction in water quality declines	improved (4-194)	insignificant (2-2, 2-3)
—Reduction in air quality declines	emissions slightly reduced (4-194)	not significant (2-1)
—Reductions in environmental losses from induced development	small	small, but may be critical at local level (2-9)
State Well-Being Losses		
—Share of income from OCS oil and gas	$66 million	$56 million*
—Increase in oil expected to be spilled in California waters by tankered imports and resulting damages	not estimated	not estimated

See footnote[1] on page 1
See footnote* on page 1

AFFIDAVIT OF MARI GOTTDIENER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN FRANCISCO)

MARI GOTTDIENER, being first duly sworn, deposes and says:

1. I am an employee of the California Coastal Commission. In my official position as OCS Coordinator, I have primary staff responsibilities for implementing the Coastal Commission's statutory role regarding offshore oil development under the Coastal Zone Management Act, the Outer Continental Shelf Lands Act, and the Federally-approved California Coastal Management Program.

2. My specific duties include review and comment on proposed lease sales and environmental documents prepared thereon, and review and recommendation to the Commission regarding the consistency with the California Coastal Management Program ("CCMP") of proposed OCS plans of exploration and plans of development submitted by individual oil company lessees.

3. In my capacity as OCS Coordinator, I have served as the principal Coastal Commission staff member on nearly all of the exploration and development plans submitted by the industry for consistency review. Exhibit 1 attached hereto is a map illustrating the location of exploration and development plans in the Santa Barbara Channel which were reviewed by the Commission for consistency with the CCMP since federal approval of the management program. Exhibit 2 attached hereto, is a chronological list of the exploration and development plan consistency reviews in the Santa Barbara Channel which is keyed by number to the locations depicted on Exhibit 1.

4. Exhibit 3 attached hereto is a map which designates the location of tracts which are proposed to be included in future lease sale 68 in the Santa Barbara Channel. A substantial number of the tracts proposed are located within the buffer zone established by the Coastal Commission for protection of significant living marine resources on and around the Santa Barbara Channel Islands.

Subscribed and sworn to before me this 1st day of July 1981

/s/ Mari Gottdiener
MARI GOTTDIENER

/s/ Ruth Natusch
RUTH NATUSCH
Notary Public in and for Said County

OCS Consistency Reviews-Channel Islands Area

California Coastal Commission

1. CC-1-78 Chevron USA, Inc.
   OCS P-0214, 216, and 219
   Commission Concurrence Dec. 13, 1978

2. CC-1-79 Exxon Corporation
   OCS P-0182, 193, 194, and 196
   Commission Currence Feb. 21, 1979

3. CC-3-79 Exxon Corporation
   OCS P-222, 223, 230, 231, 232, and 236
   Commission Concurrence March 19, 1979

4. CC-4-79 Sun Production
   OCS P-0210
   Commission Concurrence May 14, 1979

5. CC-5-79 Chevron USA, Inc.
   OCS P-0215
   Commission Concurrence Oct. 3, 1979

   CC-6-80 Chevron USA, Inc.
   OCS P-0215
   Commission Concur/Reco Sept. 16, 1980

6. CC-6-79 Union Oil POD
   OCS P-202
   Commission Concurrence Nov. 7, 1979

7. CC-7-79 Mobil Oil
   OCS P-0221
   Commission Concurrence Dec. 4, 1979

   CC-8-80 Rincon/General Drilling, Ltd
   OCS P-0221
   Commission Concurrence Feb. 21, 1980

8. CC-8-79 Chevron USA, Inc.
   OCS P-215
   Commission Concurrence Feb. 21, 1980

9. CC-9-79 Chevron USA, Inc.
   OCS P-210
   Commission Concurrence Jan. 24, 1980

10. CC-1-80 Shell Oil
    OCS P-0208
    Commission Concurrence Feb. 21, 1980

11. CC-3-80 Texaco, Inc.
    OCS P-0246, and 0251
    Commission Concurrence March 5, 1980

12. CC-4-80 Chevron USA, Inc.
    OCS P-0234
    Commission Concurrence April 15, 1980

13. CC-5-80 Chevron USA, Inc.
    OCS P-0240
    Commission Concurrence May 21, 1980

14. CC-6-80 Union Oil POD
    OCS P-0216
    Commission Concurrence June 19, 1980

15. CC-7-80 Chevron USA, Inc.
    OCS P-0205
    Commission Objection Aug. 19, 1980

16. CC-9-80 Chevron USA, Inc.
    OCS P-0241
    Commission Concurrence Sept. 16, 1980

17. CC-10-80 Texaco, Inc.
    OCS P-0245
    Commission Concurrence Sept. 16, 1980

18. CC-11-80 Challenger Minerals
    OCS P-0218
    Commission Concurrence Sept. 16, 1980

19. CC-12-80 Conoco, Inc.
    OCS P-0225
    Commission Concurrence Sept. 16, 1980

20. CC-14-80 Conoco, Inc.
    OCS P-0234
    Commission Concurrence Nov. 18, 1980

21. CC-15-80 Chevron USA, Inc.
    OCS P-0217
    Commission Concurrence Nov. 18, 1980

22. CC-16-80 Chevron USA, Inc.
    OCS P-0218
    Commission Concurrence Jan. 20, 1981

23. CC-17-80 Chevron USA, Inc.
    OCS P-0219, 0220, and 0251
    Commission Concurrence Jan. 20, 1981

24. CC-18-80 Conoco, Inc.
    OCS P-0222
    Commission Concurrence Jan. 22, 1981

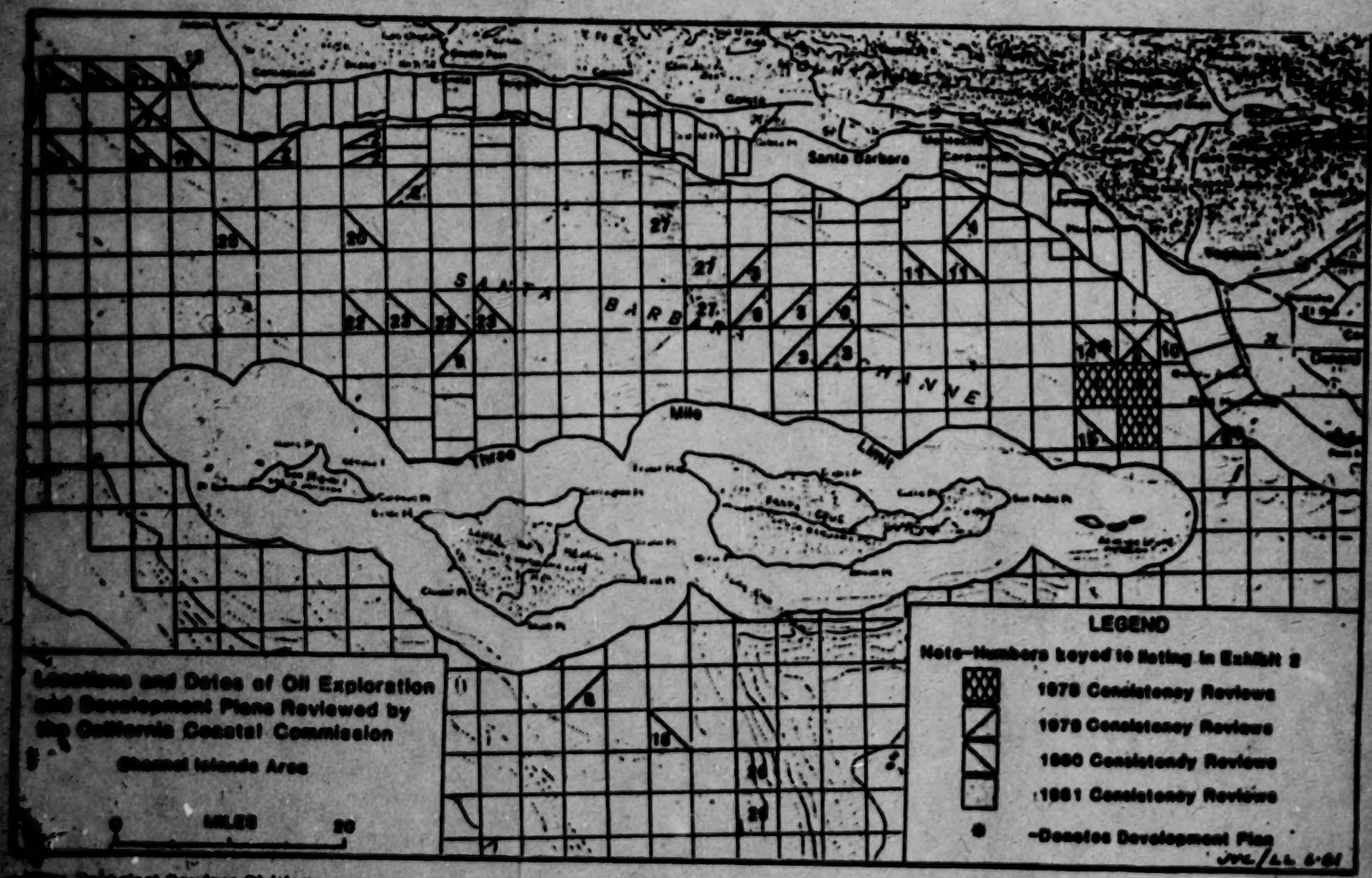
25. CC-19-80 Champlin Petroleum Co.
    OCS P-0237
    Commission Concurrence Jan. 22, 1981

26. CC-1-81 Challenger Minerals, Inc
    OCS P-0218, and 0251
    Commission Concurrence June 14, 1981

27. CC-2-81 Chevron USA, Inc.
    OCS P-0213, 0216, and 0219
    Commission Concurrence June 14, 1981

Source: Energy and Ocean Resources Division,
California Coastal Commission

Exhibit 2



Technical Services Division
California Coastal Commission

Exhibit 1

In the Supreme Court of the United States

No. 82-1326

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS,

v.

CALIFORNIA, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 16, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with case No. 82-1327, *Western Oil and Gas Association, et al.* v. *California, etc., et al.* and case No. 82-1511, *California, et al.* v. *James G. Watt, Secretary of the Interior, et al.*, and a total of one hour is allotted for oral argument.

In the Supreme Court of the United States

No. 82-1327

WESTERN OIL AND GAS ASSOCIATION, ET AL.,
PETITIONERS,

v.

CALIFORNIA, ETC., ET AL.

ORDER ALLOWING CERTIORARI. Filed May 16, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with case No. 82-1326, *James G. Watt, Secretary of the Interior, et al.* v. *California, et al.* and case No. 82-1511, *California, et al.* v. *James G. Watt, Secretary of the Interior, et al.*, and a total of one hour is allotted for oral argument.

In the Supreme Court of the United States

No. 82-1511

CALIFORNIA, ET AL., PETITIONERS,

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 16, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with case No. 82-1326, *James G. Watt, Secretary of the Interior, et al.* v. *California, et al.* and case No. 82-1327, *Western Oil and Gas Association, et al.* v. *California, etc., et al.*, and a total of one hour is allotted for oral argument.

Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1982

JAMES G. WATT, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and chapter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes and legislative history, of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1982

JAMES G. WATT, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This case involves the question of whether a federal oil and gas lease sale on the Outer Continental Shelf (OCS), Lease Sale 53, "directly affects" California's coastal zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451, *et seq.*, thereby triggering the requirement of that section that the Department of the Interior conduct a consistency determination to ensure that the lease sale is consistent, to the maximum extent practicable, with the terms of the California Coastal Management Program.[1]

In order to appreciate the significance of this issue, it is important to understand the genesis of that management program. Under the provisions of § 306 of the CZMA, 16 U.S.C. § 1455, states are encouraged to prepare coastal management programs and submit such programs to the Secretary of Commerce for federal approval.[2] Through these programs, coastal states are to provide for comprehensive management of their coastal zones, making provision for protection of important resources and for sound and orderly development along their coasts. Congress' aim in enacting

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[1]Respondents file this single brief in opposition to the petitions in both Nos. 82-1326 and 82-1327. The respondents on whose behalf this brief is filed include all of the parties plaintiff identified in DOI Pet. at (I), with the exception of the City and County of San Francisco and the Counties of Santa Clara and San Diego. For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ____." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ____a." References to the petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ____." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23."

[2]Section 306 provides for federal funding to assist states in developing and administering coastal programs and sets forth a number of requirements and findings necessary for their approval by the Secretary of Commerce. Other than this federal funding, the provision of consistency review is the only incentive for a state to develop a coastal management program.

the CZMA was to protect the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress found that development of the nation's coastal zone, including "extraction of . . . fossil fuels," was causing the loss of biological resources, open space, and the fragile shoreline itself. 16 U.S.C. § 1451(c), (d), (e).

Congress thus perceived a need to resolve the serious conflicts among important, competing uses of coastal resources and chose comprehensive state coastal management programs as the proper vehicle to resolve these conflicts:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. . . .

16 U.S.C. § 1451(i). To promote the creation of state programs and to ensure the comprehensive coastal management authority of the participant states, Congress provided that, once a state management program is approved by the Secretary of Commerce, all federal agencies must conduct their activities "directly affecting" the state's coastal zone in a manner that is, to the maximum extent practicable, consistent with the state's approved program. CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1).

In November 1977, the Secretary of Commerce approved the California Coastal Management Program (CCMP).[3] In

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[3]In April 1977, the Secretary issued a revised draft environmental impact statement and announced his intention to approve the California program. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 895 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Voluminous comments were received from a variety of sources, a substantial portion of which addressed the effects the proposed program would have on OCS oil leasing.

Interior's claims that, before approval of the CCMP, it did not anticipate application of the consistency requirements to the leasing stage and, therefore, would be unjustly surprised by such application now, DOI Pet. at 12-13, are belied by its comments on the proposed program. In its comments, the Department of the Interior, while conceding that California's program was exemplary, refused to accept the position that OCS leasing was subject to consistency review. CCMP, C.R. 3, Cal. Exh. L-18, Attachment J. at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the CCMP. *See, e.g., id.* at 29, 33, 34, 37, 40.

so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered.[4] Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> The management program provides for "adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature."

Id. at 18 (quoting 16 U.S.C. § 1455(c)(8)).

The American Petroleum Institute and the Western Oil and Gas Association (WOGA) sued to block approval of the CCMP. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). These oil industry groups brought their challenge out of a purported concern that California would use its consistency powers under the CCMP to preclude oil and gas activities along the coast. 456 F.Supp. at 922. They attacked the CCMP for the alleged failure to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities. 456 F.Supp. at 920-922. However, the district court and the Ninth Circuit both rejected these claims, as well as others that the plaintiffs advanced, finding that the Program did provide for adequate consideration of the national interest and of affected federal agencies' views. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.

Since the approval of the CCMP, California has maintained that the Department of the Interior's adjacent OCS lease sales are federal activities directly affecting the state's coastal zone for which consistency determinations must be

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[4]Interior's comments and Commerce's responses thereto are summarized in the CCMP, C.R. 3, Cal. Exh. L-18, Attachment J at 19-22.

performed.[5] The lease sale is the stage of the OCS oil and gas extraction process at which Interior indentifies specific areas of OCS lands to be offered for lease by competitive bidding and formulates lease stipulations to ensure the human and environmental safety of future operations on the lease sites. *See* DOI Pet. at 45a.

Several years of preparation and study by Interior precede each lease sale. As a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. *See, e.g.*, Final Environmental Impact Statement on OCS Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9 - 1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a. The tract selection at the lease stage determines "where the lessee can explore and produce oil and gas" and which areas will thus be exposed to the risk of oil spills. *Id.* The lease stipulations accompanying each lease sale are intended to insure protection for the coastal environment, as they influence the placement of drilling platforms and determine the standards for equipment and the training required of personnel. *Id.* at 45a-46a. The District Court concluded that "[L]easing sets in motion the entire chain of events which culminates in oil and gas development." DOI Pet. at 46a.

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[5]The National Oceanic and Atmosphereic Administration (NOAA), the Department of Commerce agency charged with administration of the CZMA, has promulgated regulations to ensure that the consistency requirements of § 307(c)(1) are carried out. 15 C.F.R. §§ 930.30-930.44. The mechanism through which a federal agency must attest that its proposed activity will be consistent to the maximum extent practicable with the state's management program is termed a consistency determination. 15 C.F.R. §§ 930.34, 930.37, 930.39.

While federal approval is required of individual lessees' plans prior to their undertaking exploratory and developmental drilling on any tracts they acquire, proposed plans for these activities on the various individual leases sold in a lease sale are not required to be submitted simultaneously, or in any particular geographic pattern. *See* 43 U.S.C. §§ 1340, 1351. In Lease Sale 53, there were 111 tracts, but the lessee's exploration and development plans are only required to focus on the activities that will occur on an individual tract. 30 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). Even more importantly, the issues examined at the exploration and development stages are far narrower than those at the lease sale stage. The question at these stages is less whether drilling will proceed on the site than where and how it will proceed.[6] In addition, at this later stage of the OCS process, it is the lessee — not Interior — who must certify consistency. 16 U.S.C. § 1456(c)(3). Thus, consistency certification of OCS activities at the post-lease sale stages as required by § 307(c)(3) must necessarily be of a more piecemeal, localized nature than review at the lease sale stage, when the geographical scope of the sale and the generic lease stipulations are entirely within Interior's control.

Prior to the decisions of the courts below, NOAA, the General Counsel of the Department of Commerce, and the Department of Justice had all taken the position that lease

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[6]As the District Court recognized, the Secretary's authority to cancel leases once awarded is "limited," and "the cancellation procedure clearly is cumbersome and time consuming." Preliminary Injunction Opinion, Reporter's Transcript of Proceedings (May 27, 1981) at 100.

sales were subject to consistency review under § 307(c)(1).[7] Nonetheless, when Lease Sale 53, off the central California coast, was in the final stages of preparation for leasing, Interior issued a negative determination, stating that none of its pre-lease activities directly affected the coastal zone. Letter from Secretary Andrus to Michael Fischer, Executive Director, California Coastal Commission (October 22, 1980), C.R. 3, Cal. Exh. L-12 at 1. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.

Thus, on April 29, 1981, California filed a complaint in the District Court for the Central District of California, seeking to enjoin the leasing of 29 of the 111 tracts proposed

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[7]Because of a disagreement over the applicability of § 307(c)(1) to the leasing stage of OCS development, in 1979 the Departments of the Interior and Commerce sought the opinion of the Department of Justice. The Department of Justice rejected Interior's position that its pre-lease sale activities were generically exempt from § 307(c)(1). Without deciding whether any particular lease sale directly affected a state's coastal zone, it agreed with the Commerce Department that these activities were subject to the consistency provisions of § 307(c)(1). Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 13.

The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to conduct a consistency determination for the final notice of sale for Lease Sale 48 off southern California. 44 Fed. Reg. 44590 (July 30, 1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales — particularly Sale 53 — the question of the applicability of § 307(c)(1) at the leasing stage. *See* 16 U.S.C. § 1456(h); 15 C.F.R. subpart 930(G). While the mediation was unsuccessful in producing any compromise, the mediator — the General Counsel of the Department of Commerce — concurred in California's view, calling the determination of the specific location in which to offer leases "the key activity that creates a right to develop those leases," and noting that consistency review at the exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Mediator's Memorandum for Secretary of Commerce (July 25, 1980), C.R. 3, Cal. Exh. L-7 at 2-3. He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 4.

For NOAA's interpretation of § 307(c)(1), *see* 20, *infra*.

for leasing.[8] Several environmental organizations simultaneously filed a similar complaint. A number of California city and county governments intervened on the side of the state.

The plaintiffs sought to enjoin preliminarily the leasing of the disputed tracts on the basis of Interior's refusal to conduct a consistency determination.[9] The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale.[10] On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

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[8]These tracts contained only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter from Secretary Watt to Governor Brown (May 1, 1981), C.R. 38, Fed. Exh. L-P.

[9]Plaintiffs did not seek a premature determination of inconsistency from the District Court but simply sought an order directing Interior to perform its consistency duties.

Plaintiffs also sought to enjoin leasing of the disputed tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345, that these tracts be deleted from the sale. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, DOI. Pet. at 5-6, WOGA Pet. at 4, the State's concerns included the negative effects of oil drilling on those tracts on many valuable biological resources, commercial and sports fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. *See* Governor's Recommendation on Lease Sale 53, Comments of State Agencies on Lease Sale 53 and Comments of Local Governments on Lease Sale 53 (April 7, 1981), C.R. 3, Cal. Exh. L-1, Appendices at 20-21.

[10]Pursuant to the request of Interior and WOGA, the District Court allowed bids on the disputed tracts to be received and opened but prohibited the award of leases. Interior was to hold the money submitted with the bids pending resolution of the case. Approximately $220,000,000 was bid, and Interior is currently holding $44,000,000, which represents the 20% of the amount bid that Interior's regulations require to be submitted with the bids.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The petitions for writ of certiorari followed the entry of the judgment of the Ninth Circuit.[11]

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[11] Respondents have filed concurrently with this opposition a cross-petition for a writ of certiorari, seeking review of Part IV.E. of the Ninth Circuit's opinion, which discusses the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1). Respondents believe that the issue petitioners present is not worthy of review by this Court and that Interior's and WOGA's petitions should be denied. If, however, this Court decides to grant their petitions, respondents wish to preserve their ability to present arguments challenging Part IV.E. The cross-petition has been filed out of an abundance of caution to insure their ability to raise those arguments.

REASONS FOR DENYING THE WRIT.

I.

THE LOWER COURTS' INTERPRETATION OF "DIRECTLY AFFECTING" AND THEIR AFFIRMATION OF CONSISTENCY REVIEW AT THE LEASING STAGE DO NOT WARRANT REVIEW BY THIS COURT.

Petitioners seek to invoke this Court's plenary review authority solely for the purpose of obtaining a narrow interpretation of a single phrase in § 307(c)(1) — "directly affecting." However, the lower courts' construction of this broad phrase does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; it is in accord with the prior opinion of the Department of Justice; and it was recently reaffirmed by Congressional statements on the subject. Every court which has construed this language so far has reached the same conclusion as the courts below. Accordingly, the phrase "directly affecting" does not merit further review by this Court.

A. The Lower Courts Properly Construed "Directly Affecting."

At the outset, it is important to recognize that petitioners can claim no generic exemption from consistency review for OCS lease sales, either in the statutory language of § 307(c) or in its legislative history. Thus, petitioners "conceded on appeal that this section does apply at the lease sale stage." DOI Pet. at 12a.[12] Petitioners also do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. At bottom,

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[12]In the argument before the Ninth Circuit, the attorney for the federal petitioners made clear this concession: "First of all we are accused of saying this provision, (c)(1), is inapplicable to leasing. We do not take that position. (c)(1) is applicable, and in this case, the Secretary did apply it." Transcript of Oral Argument (January 15, 1982) at 10.

petitioners argue that an OCS lease does not in itself "directly affect" a state's coastal zone because exploration and development are dependent upon intermediate federal approvals.[13]

It is surely no departure from any "plain meaning" of § 307(c)(1) to say that the "direct effects" of a lease are the intended uses of the property leased — in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as "the first link in a chain of events" which thereafter includes the approval of exploration and development plans, the oil and gas development and the consequent impacts upon a state's coastal zone. DOI Pet. at 13a. The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the *federal activity*, the lease, any less "direct."

This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other "federal activity" — however "indirect" — to consistency review, as petitioners imply. *See, e.g.*, DOI Pet. at 20-22. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize "effects" on a state's coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates "indirectly," or, to use petitioners' terms, "mediately, remotely or collaterally." *Id.* at 10.

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[13]Throughout this litigation, petitioners have adopted inconsistent positions on these questions. For example, before this Court, they argue that § 307(c)(1) does *not* apply to an OCS lease sale. *See, e.g.*, DOI Pet. at 8, 10, 11, 19. They also suggest that application of consistency to lease sales should not be done on a case-by-case basis, but imply that they are generically exempt. *Id.* at 19-20. Their argument in the Ninth Circuit was just the contrary. *See* note 12, *supra*. In the trial court, they asserted that the determination of whether a lease sale "directly affects" a state's coastal zone has to be made on a case-by-case basis. Reporter's Transcript of Proceedings (July 17, 1981) at 186.

In place of this common sense view, petitioners have relied principally on semantic gamesmanship. In the District Court, they offered a variety of definitions of the word "direct" from a dictionary, but ultimately the "plain meaning" they assigned the term was a definition of their own making. *Id.* at 58a-59a. In particular, they asked the District Court to incorporate into § 307(c)(1) the tort concepts of "proximate" and "intervening cause" to determine when federal activities are subject to consistency review. DOI Pet. at 59a. Similarly, in this Court, they assert that "direct effects" are those which occur "proximately" or "without any intervening agency or instrumentality of a determining influence." *Id.* at 10.

More than enough judicial attention has already been devoted to these arguments. As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* intergovernmental coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.[14]

As applied to OCS leasing in practice, petitioners' definitions of "directly affecting" are highly artificial and

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[14]For example, the District Court noted that *Black's Law Dictionary* (5th Ed. 1979) defines an "intervening cause" as one which "turns aside the natural sequence of events, . . . produces a result which would not otherwise have followed and which could not have been reasonably anticipated . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a n.16. Clearly, the intermediate federal approval required for exploration or development under an OCS lease cannot be considered an "intervening cause" in any of these respects.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. *Id.* at 10 n.11. However, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time ignore the definition adopted by NOAA, the one agency designated by Congress with that responsibility. See discussion *infra* at 20.

grossly distort the actual leasing process. For example, by virtue of the intermediate approvals for exploration and development required by Congress in the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, the Department of Interior asserts that "a lease does not authorize the lessee to explore, develop or produce oil or gas." DOI Pet. at 15. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . *authorizes exploration for, and development and production of, minerals.*" 43 U.S.C. § 1331(c) (emphasis added).

As the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.[15] If, as petitioners assert, *id.* at 21 n.21, there were so little "identifiable" or "clear relationship" between an OCS lease and actual oil and gas development, one would wonder why the members of petitioner WOGA are willing to post huge sums of money in order to secure these leases.[16]

There is nothing at all remarkable in the lower courts' rejection of petitioners' "narrow definition of 'directly affecting.' " *Id.* at 13a. The lower courts did not renounce the plain meaning doctrine as a "subterfuge," *id.* at 10, but rather rejected petitioners' misuse of that doctrine. *See, e.g.*, DOI Pet. at 58a-61a. Nor can petitioners seriously maintain that the lower courts stepped beyond the proper boundaries

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[15]As discussed *supra* at 5-6, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 17-18.

[16]In fact, on a single tract in Lease Sale 53, not disputed in this litigation, Chevron Oil Company U.S.A., Inc., and Phillips Petroleum Corporation bid $333,600,000. *Los Angeles Times*, April 29, 1981, Part I at 1.

of statutory construction in this case by extensively reviewing the legislative history and purpose of the provision in question, *see, e.g.*, WOGA Pet. at 10-11 — particularly since the statutory term "directly affecting" is not itself defined in the Act.[17] In sum, the lower courts' interpretation of the statutory language raises no novel issues warranting this Court's review.

B. There Is Nothing Unusual in Requiring an Environmental Review Under the Consistency Provision at This Important Stage of the OCS Decisionmaking Process.

Petitioners also assert that the lower courts failed to take account of what they characterize as a "unique" federal regime of "phased decisionmaking" in which "the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed" at later stages. DOI Pet. at 14. However, this type of "phased decisionmaking" is scarcely "unique" in federal statutory regimes.[18] The courts have typically rejected agency arguments of the kind petitioners make here that the environmental effects of such "initial determinations" need not be assessed because they are too "speculative, remote and subject to further . . . review" at later stages. *Id.* at 9.[19] Rather, such assessments are required to

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[17]The policy considerations behind the statute, the purpose it was intended to achieve and the legislative history are obviously important resources in determining legislative intent. *Blue Chip Stamp v. Manner Drugs*, 421 U.S. 723, 737 (1973).

[18]For example, the Mineral Lands Leasing Act, 30 U.S.C. §§ 181 *et seq.*, requires Interior to consider the environmental effects of issuance of a coal lease, 30 U.S.C. § 201(c)(3)(C), despite the fact that mining is dependent on Interior's later environmental review and approval of an "operation and reclamation plan" submitted by the lessee. 30 U.S.C. § 207.

[19]*See, e.g., Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973) (holding that the policy favoring early environmental review in NEPA outweighed the AEC's arguments that the project was of a "remote and speculative nature" and "remains uncrystallized in form and undetermined in application.")

be conducted at "the earliest possible time."[20] In holding that Interior's "initial determination to authorize oil and gas activity" required a consistency determination, the decisions of the lower courts follow these fundamental principles.[21] In this respect, there is nothing unusual about the decisions below which would warrant this Court's plenary review.

Indeed, these same principles have previously been held applicable to the phased decisionmaking procedures established for OCS development. The Court of Appeals for the District of Columbia Circuit described these procedures as "pyramidic in structure, proceeding from broad-based planning to increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court specifically rejected the same arguments as are advanced by petitioners here — that they could defer review of "highly variable or speculative matters which are best addressed at a specific future time." 668 F.2d at 1305. The court held that decisions in connection with the Interior's preparation of a five-year leasing plan must be made on the basis of the information available at the initial stages of the process, rather than being deferred to later stages:

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[20] *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (quoting CEQ regulations with approval).

[21] Petitioners purport to rely on cases decided under NEPA to excuse their failure in Lease Sale 53 to make a consistency determination under the CZMA. DOI Pet. at 15 n.16. However, NEPA is a completely distinct statute which does not alter consistency obligations under the CZMA. Petitioners concede as much when they recognize that NEPA imposes only "procedural" requirements and "does not prescribe the substantive content of federal decisions" as the CZMA does. *Id.* at 21-22. Thus, as discussed *infra* at 18-19, it is all the more important that the *federal decisions* at the lease sale stage be subjected to consistency review. Moreover, the sole issue that petitioners seek to place before this Court is whether the threshold requirement for a consistency determination is met at the lease sale stage. While the NEPA cases cited by petitioners established certain parameters for Interior's environmental review of an OCS lease, they also confirmed the threshold requirement that such a review be conducted at the leasing stage. *See also*, cases cited in notes 19, 20, *supra*, and notes 24, 25, *infra*.

> Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) [of OCSLA] nonetheless requires the Secretary at the program stage to consider each factor listed therein on the basis of the best information available, and to base the leasing information upon the information thereby obtained." *Id.* at 1307.[22]

The lower courts in the instant case thus applied principles that have been uniformly upheld in construing other environmental review statutes, as well as the OCS leasing process itself. The opinions below carefully analyzed the "pyramidic" structure of the OCS process and concluded that Congress' purpose in requiring consistency review of federal activities in § 307(c)(1) of the CZMA could be fulfilled only if consistency is determined at the lease sale stage.

The lease sale is the only stage in the OCS process at which *federal activities* are involved within the meaning of § 307(c)(1). The lease sale is the federally-initiated action which "establish[es] the basic scope and charter" for all subsequent exploration and development of the area. DOI Pet. at 13a.[23] Once the lease sale occurs, the initiative passes

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[22]Petitioner WOGA implies that the District of Columbia Circuit held in that case that consistency review was not required with respect to Lease Sale 53 but could be deferred to later stages. WOGA Pet. at 15 n.16. However, the issue of consistency review at the lease sale stage was not before the District of Columbia Circuit, and it did not so hold.

[23]Interior's decision to offer specific tracts (and not others) for leasing sets the basic parameters for the location of oil production and transportation on the OCS. For this reason, tract selection also determines broadly which coastal areas may be needed for petroleum processing and transportation; whether the mode of transportation will be pipelines or tankers (with their differing risks and impacts); where the risks of vessel collisions, well blowouts and other accidents will be increased; where OCS structures such as platforms may be built; and where other heavy industrial activities associated with OCS development are likely to occur. *See generally* DOI Pet. at 45a-46a.

to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant — not the Secretary — who must certify consistency at that stage.

From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively by the federal government. For example, it is only at that stage that the cumulative impacts of the oil and gas development which may occur under the leasing can be properly evaluated.[24] Otherwise, review is limited to specific exploration and production plans which may be submitted at different times for different tracts. As the District of Columbia Circuit observed in *California v. Watt, supra*, the Secretary has never explained how the larger decisions can be made "in the context of a decision on the placement of a particular exploratory well." 668 F.2d at 1306.[25]

The lease sale is fundamentally a "subdivision" of the OCS into tracts. Thus, the Ninth Circuit correctly discerned that "critical decisions" are made at that stage:

> Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed

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[24]*See Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (". . . when several proposals for coal-related actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.")

[25]*See also Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (holding that an EIS on a mining plan for 770 acres did not satisfy DOI's obligation to prepare a comprehensive EIS on the impact of the precedent leases of 30,000 acres of land).

to danger, the flow of vessel traffic and the siting of on-shore construction. DOI Pet. at 13a.[26]

The "direct effects" upon a state's coastal zone from these federal decisions are obviously matters of concern to the state. The Ninth Circuit determined that the intergovernmental coordination encouraged by the CZMA would be severely hampered unless the state is "permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone." *Id.* at 14a.[27]

If petitioners' view were adopted, the "federal activity" in the OCS process would never be subjected to a review for consistency. Petitioners' argument fails to recognize the important decisions made at the lease sale stage and runs counter to the case law requiring environmental review at the earliest stages of such a phased decisionmaking process.

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[26]Petitioners assert that there is insufficient information at the lease sale stage to address the sort of concerns which the state has raised regarding Lease Sale 53. DOI Pet. at 19. Nevertheless, in Lease Sale 48, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel *at the lease sale stage* expressly for a purpose similar to one of the state's concerns in Lease Sale 53 — "[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area. Letter from Secretary Andrus to Governor Brown (June 29, 1979). In addition, Interior has previously conceded that the impostion of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur. Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11, at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

[27]If consistency review were deferred, as petitioners urge, until the oil industry's submission of exploration and development plans on specific tracts leased, then the affected state and local governments would be limited to reviewing such plans under CZMA § 307(c)(3) on a tract-by-tract basis and would necessarily be deprived of the opportunity to have the provisions of the management program applied to the entire sale. Evidence presented by respondents in the District Court, for example, showed that the exploration and development plans in the Santa Barbara Channel were submitted for the state's consistency review for random geographic areas over a 2½ year period. Affidavit of Mari Gottdiener, C.R. 86 at 63. The broader concerns of the state — determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore construction should sensibly be located — are impossible to address on this piecemeal basis.

Thus, the lower courts properly concluded that the lease sale stage presented the only occasion for the important comprehensive review of the "federal activity" and properly rejected petitioners' notion that consistency review must be deferred until more information is available at later stages of the OCS process.

C. The Ninth Circuit's Decision Is in Accord with the Decisions of Other Courts on This Question, the Prior Interpretations of NOAA and the Department of Justice and the Express Intent of Congress.

The instant petitions present no occasion for this Court to resolve any conflict in decisions of the Courts of Appeals, because there is no such conflict. Every judge who has examined this issue so far has reached the same result.[28] Not surprisingly, in the wake of these decisions the Department of the Interior has itself determined to prepare consistency determinations nationwide upon all subsequent lease sales and has in some instances already prepared such determinations. DOI Pet. at 19 n.18.

Moreover, the decisions for which review is sought in this Court follow the past interpretations of the single agency charged by Congress with authority to construe the terms of the Coastal Zone Management Act, the National Oceanic and Atmospheric Administration. Thus, in its final 1979 regulations, NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to Interior's OCS pre-lease sale activities directly affecting the coastal zone." 44 Fed. Reg. 37142.[29]

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[28] *See Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 ERC 1711 (C.D. Cal. June 9, 1982) (Lease Sale 68).

[29] That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. As discussed *infra* at 25, after Congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it.

The Department of Justice itself rendered essentially the same opinion at an earlier stage. That 1979 opinion rejected the contentions of Interior that in 1976 Congress expressed its intent to exempt leases from § 307(c)(1), as well as Interior's argument that application of consistency to lease sales is incompatible with § 19 of OCSLA. *See* Department of Justice Opinion, C.R. 3, Cal. Exh. L-15. The opinion expressly concludes that the "pre-leasing activities of the Secretary of Interior are subject to the conformity requirements of Section 307(c)(1)." *Id.* at 13.

Most importantly, the interpretation of "directly affecting" by the lower courts is supported by the legislative history of the CZMA and of the OCSLA, as well as express recent pronouncements by Congress, as discussed in the next section. Thus, the question which petitioners seek to place before this Court has already been answered in the same way not only by every court which has so far considered the question but also by the agency charged with construing the statute, by the Department of Justice in prior opinions and by Congress. This case accordingly presents no occasion worthy of this Court's grant of plenary review.

II.

CONGRESS HAS DETERMINED THAT OCS LEASE SALES MUST BE CONSISTENT WITH APPROVED COASTAL ZONE MANAGEMENT PROGRAMS PURSUANT TO § 307(c)(1).

Petitioners argue that the decisions of the lower courts will disrupt a carefully ordered Congressional scheme for expedited OCS development and will imperil efforts to resolve the country's energy problems. DOI Pet. at 18-21; WOGA Pet. at 15-18. However, Congress has recognized the conflicting interests in the coastal zone and has recently reaffirmed its desire that those conflicts be resolved in precisely the manner upheld by the lower courts. If petitioners believe that the application of consistency review to OCS lease sales strikes an improper balance between state and

federal interests in the coastal zone and development in adjoining OCS areas, their remedy lies in seeking an alteration of Congressional policy and not in further review of this matter by this Court.

Petitioners would have this Court believe that Congress has determined that the "national interest" is best served solely by expediting OCS development — regardless of its impact on proper management of the coastal zone. However, the first premise of the CZMA is the Congressional finding that "[t]here is a national interest in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451(a). Congress recognized that energy demands on the OCS "are placing stress on these areas and creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1452(f). Congress also recognized that conflicts between federal agencies and states would arise.

Congress resolved these conflicts in two fashions. First, it required that states seeking federal approval of coastal management programs provide in the program for adequate consideration of the "national interest" in both the protection of the coastal environment and the siting of energy facilities. *See, e.g.*, 16 U.S.C. §§ 1452(2)(B), (C); 1453(6); 1454(b)(8); 1455(c)(8). Moreover, Congress required that state coastal programs not be approved until the views of all affected federal agencies, including Interior, have been considered.

Second, Congress established a mechanism for resolving conflicts between federal agencies and states with approved coastal programs by directing that the activities of those agencies be consistent to the maximum extent practicable with the approved programs. 16 U.S.C. § 1456(c)(1). Congress thus made clear that states with approved programs — *i.e.*, programs which adequately consider the national interest as well as the views of federal agencies — would

have, through the consistency mechanism, an important voice in federal activities affecting the coastal zone. Moreover, in the OCSLA, Congress provided that the coastal states would be given a greater role in the OCS decision-making process, without limiting any of the prerogatives granted those states in the CZMA. Thus, it is Congress that has established the relative roles of the states and Interior, and the lower courts have done no more than recognize the balance established by Congress.

Petitioners, however, are asking this Court to set a different balance than that established by Congress, despite the fact that the most recent pronouncements of Congress on § 307(c)(1) are completely contrary to their position. In effect, petitioners seek to have this Court judicially amend § 307(c)(1).

A. Congress Has Directed That a Consistency Determination Be Prepared at the Lease Sale Stage.

Petitioners rely upon selected excerpts of the legislative history of the OCSLA and the CZMA to argue that Congress did not intend OCS lease sales to be subject to consistency review. DOI Pet. at 14-18; WOGA Pet. at 15-18. However, this argument is flatly contradicted by the legislative history of both statutes.

In the legislative history to § 19 of OCSLA, 43 U.S.C. §1345, the section upon which petitioners rely, the House Report attempted to clarify the roles of Interior and the states in light of the consistency requirements of the CZMA. The House Report states as follows:

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amend-

> ments, nothing in this act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan.

H. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added). In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1866(a), which specifically provides that "nothing in that Act shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ."

In short, the OCSLA and its legislative history explicitly confirm that the consistency requirements of the CZMA apply to OCS lease sales and that the OCSLA was not intended to change that result. This is exactly the point recognized by the lower courts. DOI Pet. at 18a-19a, 51a-54a.[30]

These statements of Congress regarding the OCSLA are in full accord with Congressional statements on the CZMA. Thus, the Senate Report regarding the 1980 amendments to the CZMA states:

> The Department of Interior's activities which *preceded lease sales* were to remain subject to the requirements of section 307(c)(1). As a result, intergovernment coordination for purposes of OCS development commences at the *earliest practicable time* in the opinion of the Committee, as the Department of Interior sets in motion a series of events which has consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.

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[30]The Department of Justice, in its 1979 opinion, expressly relied upon the savings clause and the legislative history of § 19 to reject Interior's position. *See* Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 11-13.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added). The 1980 House Report also noted specifically the "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980).[31]

Given these clear statements from Congress, NOAA, the agency charged with administering the CZMA, historically took the position that federal OCS lease sale decisions required a consistency determination. It is extremely significant that when NOAA in 1981 suddenly sought to reverse this long-held position, and to exempt OCS lease sales from the requirements of § 307(c)(1), resolutions of disapproval were immediately introduced in both Houses of Congress. NOAA promptly withdrew its new regulation, citing the negative reaction from Congress as well as the coastal states. 46 Fed. Reg. 50976 (1981); *see also* DOI Pet. 17a-18a, 57a-58a. Petitioners, however, have ignored this most recent manifestation of Congressional intent as well as the relevant legislative history of the CZMA.[32]

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[31]These unequivocal statements from Congress in 1980 represent no departure from its earlier views. For example, the Senate Report accompanying the 1976 amendments to the CZMA noted that past difficulties arising from the lack of coordination between coastal states and federal agencies prior to OCS lease sale decisions could be resolved by "[f]ull implementation of the Coastal Zone Managment Act of 1972. . . ." S. Rep. No. 277, 94th Cong., 2d Sess. 3 (1975). Moreover, the Senate Report again concluded, with specific reference to federal OCS activities, that ". . . under the act as it presently exists, . . . if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." *Id.* at 37.

[32]Lacking any legislative history on § 307(c)(1) to support their position, petitioners rely on the legislative history of another section, § 307(c)(3). While § 307(c)(1) addresses federal agency activities which directly affect the coastal zone, § 307(c)(3) applies only to *applicants* for federal licenses or permits. 16 U.S.C. § 1456(c)(3). Petitioners suggest that since the word "lease" was not added to § 307(c)(3) in 1976, federal leasing activities are somehow excluded from consistency coverage under § 307(c)(1). DOI Pet. at 16-18; WOGA Pet. at 15-17. However, as discussed *supra* at notes 12, 13, this assertion completely contradicts petitioners' concession that § 307(c)(1) does apply to federal OCS lease sale decisions. Moreover, as the trial court found, this ar-

B. Pursuant to Congress' Intended Meaning of "Directly Affecting," Consistency Review Necessarily Applies at the Lease Sale Stage.

The meaning which Congress attached to the phrase "directly affecting" clearly requires that the consistency determination of § 307(c)(1) be conducted at the lease sale stage, and it is the Congressional understanding of this phrase that the lower courts applied to Lease Sale 53.

The 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to § 307(c)(1):

> It is intended that any lands or waters under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering federal agency determines them to have a *functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone*, should be administered consistent with approved state management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971) (emphasis added).[33]

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gument must be rejected as an impermissible repeal by implication. DOI Pet. at 48a. The most that can be said of the history of § 307(c)(3) is that the *applicant* for a federal OCS lease does not have to engage in a consistency determination at the lease sale stage. Congress has specifically stated that the 1976 amendments to § 307(c)(3) "did not alter *federal agency* responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added); *see also* S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

[33] "Early versions of § 307(c)(1) applied only to federal activities "in" the coastal zone. In 1972, the Conference Committee broadened the phrase considerably by substituting the "directly affecting" language now found in the Act. Petitioners assert that Congress intended to retain the original limitation of § 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of § 307(c)(1). DOI Pet. at 11 n.13. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the Senate Report specifically noted that the federal activities covered by § 307(c)(1) included ". . . activities *in or out of the coastal zone* which affect that area." S. Rep. No. 277, 94th Cong., 1s Sess. 36-37 (1975) (emphasis added).

In 1980, Congress reauthorized the CZMA. 94 Stat. 2060 (1980). Congress amended certain sections of the Act but did not alter any of the § 307 consistency provisions. However, at that time, Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of § 307(c)(1). H. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). To resolve any uncertainty, the House Report restated that 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

> Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernment coordination provisions of the federal consistency requirements should apply.

Id. at 34. *See also* S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus made its intention perfectly clear. The threshold test of § 307(c)(1), "directly affecting," is satisfied whenever a federal agency initiates a series of events of coastal management consequence. H. Rep. No. 1012, *supra*, at 34. As NOAA noted, this test is interchangeable with the "functional interrelationship" language which was derived from the 1971 Congressional deliberations. *See* 44 Fed. Reg. 37143 (1979).

The lower courts did no more than give effect to these Congressional tests.[34] As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and

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[34]Lacking support in the legislative history for their definition, petitioners are forced to argue that the 1980 legislative history is entitled to no weight. DOI Pet. at 12 n.14; WOGA Pet. at 18 - 19. Petitioners have ignored the fact that the "functional interrelationship" test is drawn from the 1971 legislative history. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a - 16a, 50a - 51a; *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n.8 (1980).

development of oil and gas on the individual tracts leased." DOI Pet. at 13a. Similarly, the District Court held:

> Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, *the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone*. Any other interpretation would thwart the purpose of the Act.

Id. at 51a (emphasis added).

Thus, Congress has repeatedly addressed — in unequivocal terms — the very question which petitioners seek to place before this Court. The decisions of the lower courts merely follow the Congressional intent underlying § 307(c)(1). However much petitioners may believe that the national interest will be served by a reversal of these decisions, the appropriate forum for consideration of such a reversal is Congress, not this Court.

III.

THE DECISIONS BELOW WILL NOT DISRUPT OCS LEASING OR OTHER FEDERAL ACTIVITIES.

Petitioners argue that the decisions of the lower courts portend delay and litigation over future OCS lease sales, as well as disruption of other federal activities. DOI Pet. at 18-22. However, what petitioners ignore is that the lower courts have merely followed the will of Congress that the CZMA apply in this fashion to OCS activities.

Moreover, adherence to the decisions below has caused no disruption of OCS activities. Consistency determinations are now being prepared by Interior on all OCS lease sales without causing any apparent undue burdens. Indeed, the American Petroleum Institute has recently informed the Court of Appeals for the District of Columbia Circuit that

the Ninth Circuit's ruling has resulted in only "insignificant" revisions in the scheduling of several lease sales.[35]

In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if state management program are applied in § 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states are relegated to review of individual exploration and development plans under § 307(c)(3) at a later stage of the process. As the District Court found:

> If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual leases as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA.

DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environment and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources*." 44 Fed. Reg. 37142 (1979) (emphasis added). Thus, application of § 307(c)(1) at the lease sale stage may well lead to early resolution of problems rather than forcing resolution on a tract-by-tract basis under § 307(c)(3).[36]

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[35] "Supplemental Memorandum of Intervenors in Response to Court Order dated January 28, 1983," filed February 7, 1983, in *State of California v. Watt*, D.C. Cir. No. 80-1894, *et al.*

[36] Section 307(c)(3) provides that an applicant for a federal license or permit to conduct an activity affecting land or water uses in the coastal zone shall provide a certification that the proposed activity complies with the approved coastal program and will be conducted in a manner consistent with the program. The federal agency may not issue the permit or license until the state concurs in the consistency certification or unless the Secretary of Commerce finds the activity to be consistent with the state program or otherwise in the interest of national security. 16 U.S.C. § 1456(c)(3).

Similarly, the possibility of a state using § 307(c)(1) to veto OCS development is simply not supported. First, it is Interior and not the state that issues a determination of whether the lease sale can be conducted consistent with the state's coastal management program. 15 C.F.R. § 930.34. Second, consistency is required to be determined only for state programs approved by NOAA. Under the CZMA, NOAA cannot approve a state program unless the program gives adequate consideration to the national interest in both coastal protection and energy development and to "the views of federal agencies principally affected by such programs." 16 U.S.C. §§ 1452(2)(A), (B); 1455(c)(8), 1456(b). In fact, the California Coastal Management Program has been specifically held to satisfy those requirements. *American Petroleum Institute v. Knecht*, 609 F.2d 1036, 1315 (9th Cir. 1979).

Finally, petitioners allege that the lower courts' reading of "directly affecting" will disrupt a "wide range of federal activities." DOI Pet. at 20-21. Petitioners fail to note that the lower courts' decisions were consistent with NOAA's longstanding view that "directly affecting" must be liberally construed. Despite NOAA's interpretation, which has been relied upon by federal agencies and coastal states for a number of years, the federal government has not been thrown into chaos, contrary to petitioners' contentions.[37]

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[37]In fact, petitioners can provide no example of such disruption except for a single hypothetical involving coal leasing in Wyoming. DOI Pet. at 20 n.21. However, there is nothing in the opinions below which supports the application of § 307(c)(1) to such a farfetched hypothetical. Nor do petitioners provide any evidence that any coastal state has ever asserted such a position. Other than this single example, petitioners never explain how federal activities will be thrown into "chaos." It is obvious that OCS leasing immediately adjacent to a state's coastal zone, with recognized impacts flowing from such leasing, has a "clear" and "identifiable" relationship to the coastal zone, in contrast to a coal lease in Wyoming where there exists merely "the *possibility* that a lessee *might* use a *proposed* pipeline to transport coal to a gulf coast port." DOI Pet. at 20 n.21 (emphasis added).

Conclusion.

The petitions for a writ of certiorari of the Department of Interior and the Western Oil and Gas Association should be denied.

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No. 82-1326

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents contend (Br. in Opp. 13-15) that the consistency requirements of the Coastal Zone Management Act of 1972 (CZMA), as construed by the court of appeals, are benign and, in principle, no different from countless other statutes requiring federal agencies to conduct an "environmental review" (*id.* at 15) of their proposed actions at an early stage in the planning process. In this respect, respondents fundamentally misstate the nature of the consistency provisions of the CZMA. As we explained in our petition (at 21; see also *id.* at 9), Section 307(c)(1) of the CZMA imposes *substantive* limitations on federal activities; indeed, if the CZMA's consistency provisions required only that the Secretary of the Interior "consider" or "review" the possible effects of Outer Continental Shelf (OCS) oil and gas activities on adjacent states' coastal zone management programs, it is extremely doubtful that the government would be seeking this Court's review, or even

that this litigation would have arisen at all, because the government already conducts comparable reviews under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Instead, this controversy is due to respondents' insistence on the premature application of a substantive limitation on federal activities. Respondents themselves, while seeking to downplay the importance of the decision below, at the same time recognize its momentous significance for the balance of power between the states and the federal government when they assert that "directly affecting" must be broadly construed in order to "ensure the comprehensive coastal management authority" of the states (Br. in Opp. 2; see also respondents' Cross-Petition in No. 82-1511, at 6-7, 10). Thus, respondents' citations to statutes[1] and case law[2] that require federal agencies to conduct procedural reviews of the possible future or cumulative impacts

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[1]For example, the Mineral *Lands* Leasing Act, 30 U.S.C. 201(a)(3)(C) (Br. in Opp. 13 n.18), requires the Secretary of the Interior to "consider effects which mining of the proposed lease" might have on the surrounding area. It also requires the Secretary to "evaluate and compare" the effects of various mining techniques prior to issuing a lease, but this evaluation "shall not prohibit the issuance of a lease." A substantive limitation — maximum economic recovery — based on such an evaluation is imposed only at a later stage: approval of the mining operation plan.

[2]*California* v. *Watt*, 668 F.2d 1290 (D.C. Cir. 1981) (Br. in Opp. 14-15), involved Section 18 of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), 43 U.S.C. (Supp. IV) 1344, which requires the Secretary to develop a five-year leasing schedule for OCS lease sales after gathering and evaluating information concerning various factors identified in the statute. The court noted that Section 18 does not impose substantive limits on the ultimate decisions reached by the Secretary: "The Act does not mandate any particular balance, but vests the Secretary with discretion to weigh the elements * * *" (668 F.2d at 1317). Thus, Section 18 is comparable to NEPA, imposing essentially procedural duties. See *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980). Respondents' reliance on NEPA case law (Br. in Opp. 13 n.19, 16 nn.24-25) is thus inapposite here.

of their actions at the early stages of a project are irrelevant to the present controversy. The decision below represents far more than a new paper-work requirement, a fact attested to by respondents' vigorous attempts to defend their victory.

2. Respondents claim (Br. in Opp. 26-28) that the decision below will reduce, rather than generate, future controversies. In the OCS lease sale context alone, however, the Ninth Circuit's decision already has provided a fertile ground for litigation. Since the decision in August 1982, the Department of the Interior has prepared 29 consistency determinations for ten OCS lease sales scheduled to be held between October 1982 and August 1983.[3] As of this date, nearly every lease sale held subsequent to the Ninth Circuit's decision has drawn a legal challenge based, in part, on the Coastal Zone Management Act. See *North Slope Borough, et al.* v. *James G. Watt, et al.*, No. A82-421 (D. Alaska) (Sale BF-Beaufort Sea); *Association of Village Council Presidents, et al.* v. *James G. Watt*, No. A83-150 (D. Alaska) (Sale 57-Norton Sound); *Conservation Law Foundation* v. *Watt*, No. 83-0506 MA (D. Mass. Mar. 28, 1983) (Sale 52-North Atlantic); *Village of False Pass, et al.* v. *James G. Watt, et al.*, No. A83-176 (D. Alaska) (Sale 70-St. George Basin). In the Massachusetts case, the district court enjoined the lease sale for, *inter alia*, alleged noncompliance with the CZMA. Despite a 30-page consistency determination that the court acknowledged satisfied all procedural requirements of the CZMA and its implementing regulations, the court in effect held that the Secretary

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[3]As noted in our petition (at 19 n.18), the Department of the Interior has prepared consistency determinations in an effort to avoid injunctions against lease sales that are to be held prior to this Court's disposition of this litigation. Multiple consistency determinations are often necessary for a single OCS lease sale because more than one state may be adjacent to the sale area.

had not satisfied his *substantive* burden of establishing full consistency with Massachusetts' coastal zone management program. *Conservation Law Foundation* v. *Watt*, *supra*, slip op. 34-35, 40, appeal pending, No. 83-1258 (1st Cir.). The court further held that the Secretary may not rely on the State's authority under Section 307(c)(3)(B) of the CZMA to deal with specific problems as they arise at later stages to establish the required degree of consistency at the lease sale stage (slip op. 40). Contrary to respondents' assertions, therefore, the massive interference with the OCS oil and gas leasing process forecast by petitioners (Pet. 19-20) is clearly evident.[4]

In contexts other than the OCS oil and gas program as well, consistency determinations are being demanded by the states for a wide variety of federal actions that do not themselves cause any direct physical impacts on the coastal zone, on the theory that such actions represent the "first link in a chain of events" (Pet. App. 13a) that eventually could lead to coastal zone effects. These actions include planning activities of the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service; land acquisition and disposal;[5] and the development of guidelines for future permitting decisions. Each of these activities

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[4]Application of substantive limitations at the lease sale stage, as required by the Ninth Circuit's decision and by the more recent Massachusetts decision, is particularly inappropriate in the context of the OCS oil and gas program. Although respondents disparage (Br. in Opp. 4-5, 16-17) the effectiveness of the step-by-step OCS decisionmaking process, they have been unable throughout this litigation to identify one possible coastal zone effect that is not capable of being reviewed and controlled at the appropriate time.

[5]The courts have recognized that the transfer of a property interest to or from the federal government often is not the crucial decision for environmental planning purposes. See, *e.g.*, *United States* v. *162.20 Acres of Land, More or Less, Situated in Clay County*, 639 F.2d 299, 304 (5th Cir.), cert. denied, 454 U.S. 828 (1981) (National Historic Preservation Act); *South Dakota* v. *Andrus*, 614 F.2d 1190 (8th Cir.

involves a preliminary federal decision that leaves the states free to ensure consistency with their programs when actual activity is to be undertaken or permits issued. Thus, the court of appeals' decision in this case has affected a broad range of federal programs by imposing a premature substantive limit on federal decisionmaking.[6]

3. Inexplicably, respondents rely (Br. in Opp. 19) upon an opinion of the Department of Justice's Office of Legal Counsel (OLC) in support of their contention that the Ninth Circuit's decision is in full accord with the views of the federal government. Memorandum Opinion for the General Counsel, Department of Commerce, and the Solicitor, Department of the Interior, No. 79-28, 3 Op. Off. Legal Counsel 189 (1979). It would apear that respondents failed to read the entire OLC opinion. It is true that the opinion concluded that the consistency requirements of Section 307(c)(1) of the CZMA do apply to lease sales, a position that respondents acknowledge the government supported during the course of this litigation (Br. in Opp. 9 & n.12). What respondents ignore, however, is that portion of the OLC opinion that reviewed the then-existing federal regulations implementing Section 307(c)(1); those regulations substituted the term "significantly" for the statutory term "directly" and then defined "significantly" in terms of "primary, secondary, and cumulative effects." 3 Op. Off.

1980) (NEPA). In the CZMA context, the federal project for which the land is being acquired, rather than the mere fact of acquisition, is the proper subject of consistency review. In the case of disposition, the land will be subject to the State's plenary authority once it leaves federal hands. In either circumstance, therefore, consistency review for an acquisition or disposal decision may be entirely inappropriate even though that decision could be viewed as the "first link in a chain of events" (Pet. App. 13a) that may ultimately lead to coastal zone effects.

[6]As previously noted (see pages 1-3, *supra*), Section 307(c)(1) of the CZMA goes well beyond mere "consideration" or "review" of the states' coastal zone management programs.

Legal Counsel, at 196. The OLC opinion stated that "we are unable to accept an interpretation that would dilute 'directly,' first to 'significantly' and then to 'primarily, secondarily, and cumulatively' " (*id.* at 197). The opinion unequivocally declared that "the conformity requirement of § 307(c)(1) applies only to the preleasing activities of the Department of the Interior *directly* affecting the Coastal Zone" (*ibid.*; emphasis added). As a result of this opinion, the regulations that substituted the term "significantly" for "directly" in Section 307(c)(1) were withdrawn (44 Fed. Reg. 37142 (1979)). Accordingly, the 1979 regulations (see Br. in Opp. 18) restating the conclusions reached in the OLC opinion in no way contradict the government's legal position.

In short, it is respondents' arguments (Br. in Opp. 16-18) and the court of appeals' decision (Pet. App. 13a) that conflict with the OLC opinion, rather than the government's position in this Court. Just as OLC found that NOAA had exceeded its authority in substituting lesser standards for the statutory phrase "directly affecting the coastal zone," so too the court of appeals impermissibily substituted its judgment for that of Congress when it based its decision on the purported cumulative and future effects of an OCS oil and gas lease sale, rather than its *direct* effects.

4. Respondents rely on recent — 1980 and 1981 — committee reports to establish the meaning of the term "directly affecting the coastal zone" in the OCS lease sale context (Br. in Opp. 22-23, 25). These reports, however, were not prepared in connection with the enactment or amendment of the consistency provisions of the CZMA or the OCSLA. Instead of illuminating the meaning of "directly affecting the coastal zone" as enacted by Congress in 1972, the language of these reports represents "only the personal views of

the[] legislators" sitting in the majority on committees eight and nine years later. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), quoting *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967); *TVA* v. *Hill*, 437 U.S. 153, 193 (1978).[7]

As detailed in our petition (at 16-18), Congress confronted the problem of integrating the consistency provisions of the CZMA with the staged system of federal decisionmaking under the OCSLA in the 1976 Amendments to the CZMA. In that measure, Congress rejected consistency review of exploration, development and production activities at the leasing stage and prescribed a step-by-step consistency regime for such activities when the respective stages in the OCS process are reached (see Pet. 17).

However, when the CZMA was reauthorized in 1980, as noted in the petition (at 12 n.14), language was inserted in the committee reports suggesting that regulations reflecting an expansive view of the term "directly affecting the coastal zone" be adopted (Br. in Opp. 22-23).[8] Furthermore, when regulations reflecting the government's interpretation of the phrase, and not respondents', were adopted in 1981, a resolution of disapproval was passed by the House Committee

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[7]Respondents also rely (Br. in Opp. 24) on language from a 1971 Senate Report, S. Rep. No. 92-526, 92d Cong., 1st Sess. 20, as bearing on the proper definition of the term "directly affecting the coastal zone" first introduced into the CZMA a year later. Two points must be mentioned. First, the language in the report refers to unique areas of the OCS, such as channels or bays, with close proximity to the coastal zone and not to activities on the OCS as a whole. Second, the quoted language is not reflected in the bill reported to the Senate in 1971; at most, it constitutes advice that, in 1971, the Congress was not prepared to enact into binding law.

[8]The 1980 legislation did not amend or reenact the consistency provisions of Section 307 of the CZMA. The language inserted in the committee reports, therefore, was unrelated to the legislation then before Congress.

on Merchant Marine and Fisheries on a sharply divided (20-15) vote. In relying on this resolution, however, respondents fail to point out that the dissenting members, including some of those who sat on the Committee in 1972 and participated at conference in 1976, wrote that the resolution "is inconsistent with the previous actions of Congress * * *." H. Rep. No. 97-269, 97th Cong., 1st Sess. 16 (1981). They explained that "the Conference Committee [in 1976], in which some of us participated * * * reject[ed] the notion that absolute consistency should apply in all cases during the planning for, and holding of, lease sales." *Id.* at 17. Further, the dissenters stated (*ibid.*):

> To now argue that we intended otherwise is completely contrary to these facts. All other attempts, subsequent to our 1976 action, which try and impose a gloss on such actions are similarly defective and should be dismissed as the dicta they represent.

We do not offer these statements as direct support for our interpretation of Section 307(c)(1) or for our position on the merits in this litigation. Instead, these congressional remarks illustrate that the so-called post-enactment legislative history upon which respondents so heavily rely (Br. in Opp. 22-23, 25), and which was created in the midst of the legal controversy that this case presents, does not constitute the universal opinion of the legislative branch.

The Court has often stated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960); see also *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). This observation is especially apt here because the available evidence establishes that the 1980 and 1981 reports are not reliable expressions of congressional intent in 1972. The membership of the committe had

radically changed since 1972,[9] and could not be presumed to have special knowledge of the meaning intended by the original legislation. Moreover, the views expressed in the reports are those only of the majority of the members sitting on the committees in 1980 and 1981; they were never directly voted upon by either House of Congress. To attach substantial weight to the cited committee reports would essentially relegate the meaning of statutory terms to the statements of transitory majorities of committees in post-enactment sessions of Congress.

5. Finally, a word should be said concerning the Court's experience with statutes concerning the environment and the nation's natural resources. These statutes, although lofty of purpose, almost always reflect compromise between the opposing interests of development and protection. Time after time, the government has had to seek this Court's intervention because the lower courts have substituted what they perceived to be wise public policy for the words of the statute Congress enacted. See, *e.g.*, *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981) (experimentation with bidding systems under OCSLA); *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981) (hypothetical EIS under NEPA for nuclear weapons storage); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223 (1980) (imposition of substantive standards under NEPA); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) (imposition of procedural requirements beyond those prescribed by statute and regulation); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 137-138 (1977) (cross petition) (provision for variances for new

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[9]Indeed, of the members voting on the 1981 resolution of disapproval only six (of 35) sat on the committee in 1972. Five of these six voted against the resolution, *i.e.*, against the majority statement relied upon by respondents.

sources under the Clean Water Act); *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976) (comprehensive EIS under NEPA when there was no proposal for comprehensive action before the agency). We submit that this is another such case. Stripped to its essentials, the court of appeals substituted its vision of the purposes of the CZMA for the language actually employed by Congress in Section 307(c)(1) of that Act. In so doing, moreover, the court seriously altered the balance struck by Congress between the competing interests of the state and federal governments in the planning and control of the nation's energy resources. Such judicial overreaching requires correction by this Court.

CONCLUSION

For the foregoing reasons and the reasons in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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QUESTION PRESENTED

Whether an outer continental shelf lease sale that does not authorize any conduct having a physical impact upon the coast is a federal activity "directly affecting the coastal zone" within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1).

PARTIES TO THE PROCEEDINGS

This litigation was commenced by the filing of separate but virtually identical complaints by the State of California and various environmental action groups. Parties plaintiff include the State of California, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Several Cailfornia political subdivisions intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of the Interior, were the United States Department of the Interior; the United States Bureau of Land Management; Edward Hastey, then Acting Director of the United States Bureau of Land Management; and Robert Burford, then Director Designate and now Director, United States Bureau of Land Management. The Western Oil and Gas Association

intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1326

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 683 F.2d 1253. The opinion of the district court (Pet. App. 34a-78a) is reported at 520 F. Supp. 1359.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982 (Pet. App. 82a). A timely petition for rehearing was denied on November 10, 1982 (Pet. App. 83a). The petition for a writ of certiorari was filed on February 8, 1983, and granted on May 16, 1983 (J.A. 156).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1), provides (Pet. App. 84a):

[1] The petition for a writ of certiorari in *Western Oil & Gas Association* v. *California*, No. 82-1327, and the conditional cross-petition in *California* v. *Watt*, No. 82-1511, were also granted on May 16, 1983.

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

Pertinent provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1331 *et seq.*, are reprinted at Pet. App. 87a-99a.

STATEMENT

Pursuant to Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1) ("CZMA"), federal "activities directly affecting the coastal zone" are subject to the substantive requirement that they be conducted in a manner that is consistent "to the maximum extent practicable" with an approved state coastal zone management program. This litigation raises the question whether the substantive consistency requirement of Section 307(c)(1) properly applies to an outer continental shelf ("OCS") oil and gas lease sale conducted pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1331 *et seq.* ("OCSLA"), when that sale has no physical impact upon the coastal zone but merely sets in motion a chain of events that may eventually result in such an impact.

1. a. The Coastal Zone Management Act of 1972, 16 U.S.C. (& Supp. V) 1451 *et seq.*, was enacted to encourage the wise use of the land and water resources of the coastal zone through the development and implementation of state management programs (Section 303, 16 U.S.C. (Supp. V) 1452).[2] Before a state management

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[2] Under the Act, the coastal zone includes coastal waters and adjacent shorelands with the exception of federal property. The zone extends seaward to the outer limit of United States territorial waters, three geographical miles from the coastline (Section 304(1), 16 U.S.C. 1453(1)). The outer continental shelf, by definition, lies beyond the belt ceded to the states in 1953 by the Submerged Lands Act, 43 U.S.C. 1301(a), (b); 43 U.S.C. 1331(a). In the case of California, like all other states bordering on the

program becomes effective, it must be approved by the Secretary of Commerce (Sections 305(h), 306(c), 16 U.S.C. 1454(h), 1455(c)), who must insure that the views of the federal agencies principally affected by the state's program have been adequately considered (Section 307(b), 16 U.S.C. 1456(b)). Following approval of a state management program, the activities of the federal government, as well as the actions of its licensees and permittees, must meet the various consistency requirements of the Act (Section 307(c), 16 U.S.C. (& Supp. V) 1456(c)).

Section 307(c)(1) of the CZMA sets forth the consistency requirements imposed upon the activities of the federal government. The section mandates that each federal agency "conducting or supporting activities affecting the coastal zone" conduct or support those activities "in a manner which is, to the maximum extent practicable, consistent with approved state management programs" (16 U.S.C. 1456(c)(1)). Pursuant to Commerce Department regulations implementing this provision, federal agencies are required to prepare a document termed a "consistency determination" for any activity that will have a direct effect upon the coastal zone of a state with an approved management program (15 C.F.R. 930.34).[3] The consistency determination identifies the direct effects of the federal activity and provides the state with an explanation of how the federal agency has tailored its proposed activity to achieve consistency with the state program (15 C.F.R. 930.39).

Section 307(c)(3)(A) of the Act, 16 U.S.C. 1456(c)(3)(A), addresses the consistency obligations of most

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Pacific or Atlantic Oceans, the "coastal zone," like the Submerged Lands Act grant, extends three geographical miles seaward from the coastline. 43 U.S.C. 1301(b). See *United States* v. *California*, 381 U.S. 139 (1965).

[3] If the federal agency determines that an activity will not directly affect a coastal zone, the agency, in certain circumstances, must provide the state with notification of its "negative determination" (15 C.F.R. 930.35(d)).

federal licensees or permittees. Applicants for federal licenses or permits are required to supply consistency certifications for any "activity affecting land or water uses in the coastal zone." 16 U.S.C. 1456(c)(3)(A). The state is then given an opportunity to concur with the certification. If the appropriate state authorities decline to concur, the federal agency from whom the license or permit is sought must reject the application. The state's veto of an applicant's consistency certification can be overridden by the Secretary of Commerce, however, if the Secretary finds that the applicant's proposed activity is consistent with the CZMA or is otherwise necessary in the interest of national security (*ibid.*).

In 1976, Congress added Section 307(c)(3)(B), 16 U.S.C. (& Supp. V) 1456(c)(3)(B), to the consistency provisions of the Act for the express purpose of integrating petroleum development activities on the outer continental shelf into the CZMA's statutory scheme. H.R. Conf. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976). Under Section 307(c)(3)(B), any lessee seeking approval of exploration, development or production plans for areas leased under the OCSLA must "attach to such plan a certification that each activity * * * described in detail in such plan" will be carried out in a manner consistent with an approved program if it "affect[s] any land use or water use in the coastal zone." This consistency certification, like the certification required by Section 307(c)(3)(A), is subject to state concurrence or override by the Secretary of Commerce prior to the issuance of any federal permit or license for the activities described in the plan. Thus, the states have significant substantive control over all exploration, development and production activities on the OCS that affect the coastal zone. Moreover, as detailed below, this CZMA consistency certification requirement has been specifically incorporated into the Outer Continental Shelf Lands Act. 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d).

b. The Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 *et seq.*, was enacted in 1953 to authorize

federal leasing of the outer continental shelf for oil and gas development beyond the state territorial sea belt. See note 2, *supra*. In 1978, Congress amended the OCSLA (Pub. L. No. 95-372, 92 Stat. 632 *et seq.*) to provide for, *inter alia*, the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. (Supp. V) 1332(3). H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 53 (1977). The Act, as amended, establishes distinct stages for federal decision-making regarding oil and gas development activities on the OCS, and specifically provides for input by affected states as well as a balancing of environmental concerns at each stage of the OCS oil and gas process. The stages in that process can be described as (1) development of a leasing program, 43 U.S.C. (Supp. V) 1344; (2) preparation and leasing, 43 U.S.C. (Supp. V) 1337(b); (3) exploration, 43 U.S.C. (Supp. V) 1340; and (4) development and production, 43 U.S.C. (Supp. V) 1351.[4]

Section 18 of the OCSLA, 43 U.S.C. (Supp. V) 1344, requires the preparation of a five-year leasing program to provide an overall framework and schedule for OCS lease sales. During the preparation of a five-year leasing program, the Secretary is required to solicit comments from "any interested Federal agency" and the "Governor of any State which may become an affected State under such proposed program" (43 U.S.C. (Supp. V) 1344(c)(1)). The Secretary is required to respond in writing to all comments or requests received from a state governor, "stating his reasons" for "granting or denying such request in whole or in part" (43 U.S.C. (Supp. V) 1344(c)(2)). The proposed program is then

[4] Some provisions of the OCSLA apply throughout all stages of the OCS oil and gas process. Regulations promulgated pursuant to 43 U.S.C. (Supp. V) 1334(a)(1)(B), for example, provide for suspension or temporary prohibition of all OCS operations if "there is a threat of serious, irreparable or immediate harm" to life or the environment. 30 C.F.R. 250.12(a)(1)(ii). The regulations also provide for cancellation of leases if such dangers cannot be resolved. 30 C.F.R. 250.12(d)(4).

published in the Federal Register for a 90-day comment period, and is thereafter submitted to the President and Congress, together with all comments received and all correspondence between the Secretary and the governor of an affected state (43 U.S.C. (Supp. V) 1344(c)(2), (3) and (d)(1), (2)). After a Section 18 program is approved, OCS lease sales proceed in conformity with its month-by-month schedule. 43 U.S.C. (Supp. V) 1344 (d)(3).

The solicitation of bids and issuance of offshore leases constitute the next stage of the OCS oil and gas process. 43 U.S.C. (Supp. V) 1337(a). Prior to the actual lease sale, however, the Secretary is required to undertake a variety of discrete actions. See 43 C.F.R. 3310 *et seq.* (to be recodified at 30 C.F.R. 256). An environmental impact statement ("EIS") is normally prepared pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA"), and consultation among various government agencies may be initiated under Section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. (Supp. V) 1536(a) ("ESA"), if any listed species may be affected by the proposed lease sale. More important, under Section 19(a) of the OCSLA, the governor of any affected state, as well as the executives of any affected local governments, are given a formal opportunity to submit recommendations regarding "the size, timing and location" of a proposed lease sale. 43 U.S.C. (Supp. V) 1345(a). The Secretary is directed to accept these recommendations if he determines that they provide a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. (Supp. V) 1345(c). The Secretary's resolution of any conflicts at this stage is final and may be set aside only if found to be arbitrary or capricious. 43 U.S.C. (Supp. V) 1345(d).

Following these preparatory steps, which include the publication of a proposed and final notice of the lease sale (30 C.F.R. 256, Subpt. F), the Secretary may proceed with the actual lease sale. The OCSLA authorizes

the Secretary to grant leases to the highest responsible qualified bidders at the sale. 43 U.S.C. (Supp. V) 1337 (a). The lease awarded at the sale, however, entitles its holder to undertake only extremely limited activities without further federal approval. See 43 U.S.C. (Supp. V) 1340(c) (approval required prior to exploration); 43 U.S.C. (Supp. V) 1351 (approval required prior to development and production). Regulations promulgated by the Department of the Interior provide that a lease only entitles its holder to conduct "preliminary activities" on the OCS. 30 C.F.R. 250.34-1. These "preliminary activities" are defined as "geophysical, and other surveys necessary to develop a comprehensive exploration plan" so long as such activities "do not result in any physical penetration of the seabed of greater than 300 feet of unconsolidated formations" and "do not result in any significant adverse impact on the natural resources of the [OCS]" (*ibid.*). More extensive activity is permitted only upon a lessee's compliance with the procedures and substantive requirements of the next stage: exploration.

Prior to commencing exploration activities, a lessee must submit a detailed exploration plan to the Secretary for approval. 43 U.S.C. (Supp. V) 1340(c). The Secretary must disapprove a plan if the activity would likely cause serious harm or damage to life or property or to the marine, coastal or human environment. *Ibid.* A lessee submitting a plan that affects any land or water use in the coastal zone of a state with an approved management program must also attach to the plan a certification that the activities described in the plan comply with the state's coastal zone management program. *Ibid.*; 16 U.S.C. (& Supp. V) 1456(c)(3)(B). The Secretary may not grant any license or permit for any activity described in an exploration plan until the state concurs with the certification of compliance, or a determination of consistency or necessity is made by the Secretary of Commerce. *Ibid.* Only after an exploration plan is approved will drilling permits and other necessary licenses be issued to authorize exploration activities.

The final stage under the OCSLA, development and production, is reached only if commercial quantities of oil and gas are discovered. As with the exploration stage, the lessee must submit a detailed development and production plan to the Secretary for approval prior to commencing any production activities on the OCS. 43 U.S.C. (Supp. V) 1351(a)(1).[5] The plan, together with all supporting documents, is submitted by the Secretary to the governor of any affected state for comment and review (43 U.S.C. (Supp. V) 1351(a)(3) and (g)). To obtain approval, the plan must be in compliance with the OCSLA and its implementing regulations (43 U.S.C. (Supp. V) 1351(h)(1)(A)), and must include a certification of consistency with the coastal zone management program of any affected state. 43 U.S.C. (Supp. V) 1351(d); 16 U.S.C. (& Supp. V) 1453(c)(3)(B).[6] Approval of the development and production plan is contingent upon an affected state's concurrence with or the

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[5] The plan must describe all facilities, on or off the OCS, that will be utilized in the development and production of oil and set forth all environmental safeguards and other safety standards that will be implemented during production (43 U.S.C. (Supp. V) 1351(a)(2) and (c)).

[6] At least one development and production plan in any area or region of the OCS (other than the Gulf of Mexico) must be declared a "major Federal action" for purposes of NEPA (43 U.S.C. (Supp. V) 1351(e)), and the ensuing draft environmental impact statement on the development plan must be sent to the governor of any affected state for review and comment (43 U.S.C. (Supp. V) 1351(f)) prior to the public hearing on the EIS (43 U.S.C. (Supp. V) 1351(h)). The Secretary is directed to disapprove a development and production plan if exceptional geological conditions, marine or coastal resource values, or other exceptional circumstances dictate disapproval despite compliance with the Act and its regulations. 43 U.S.C. (Supp. V) 1351(h)(1)(D). If these circumstances cannot be cured or mitigated in a five-year period, the lease will be cancelled and the lessee will be entitled to compensation. 43 U.S.C. (Supp. V) 1351(h)(2)(C). If the Secretary disapproves a development and production plan for other reasons, including failure to obtain state concurrence on CZMA consistency, no compensation is afforded the lessee. 43 U.S.C. 1351(h)(2)(A).

Secretary of Commerce's override of the state's objections to this consistency certification. 43 U.S.C. (Supp. V) 1351 (h)(1)(B). Finally, Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, grants the governor of an affected state as well as appropriate representatives of local governments a formal opportunity to submit recommendations with respect to a proposed development and production plan. As with the comments received concerning the lease sale itself (page 6, *supra*), the Secretary is to accept the state's recommendations if they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. (Supp. V) 1345(c). Again, the Secretary's decision is final unless found to be arbitrary and capricious. *Ibid.*

2. This litigation arises out of the Department of the Interior's decision to offer 111 OCS tracts off central California for leasing under the OCSLA (46 Fed. Reg. 23678-23680 (1981)). As contemplated by the statutory scheme outlined above, the State of California has been intimately involved in the administrative procedures leading up to that decision.

Preparation for OCS Lease Sale No. 53, Santa Maria Basin, began in the early fall of 1977, when Interior requested the Geological Survey and other federal and state agencies to provide reports on potential oil and gas resources located in the Pacific OCS from Point Conception, Santa Barbara County, California, north to the California-Oregon border (C.R. 85; A.R. 1w-15w).[7] In November 1977, the Department published a "[c]all for [n]ominations" that requested potential bidders, as well as federal, state and local governmental agencies, environmental organizations and the public, to identify which of some 2,036 blocks in the area should be offered for lease and which should be restricted or specifically excluded. 42 Fed. Reg. 60794 (1977). After reviewing this information, on October 10, 1978, Interior selected 243 blocks

[7] "C.R." refers to the Clerk's Record; "A.R." refers to the Administrative Record.

for further environmental analysis and consideration (C.R. 85; A.R. 91w). See 43 C.F.R. 3314.1(a). Of these 243 blocks, 115 were located in the Santa Maria Basin located off western Santa Barbara and San Luis Obispo Counties, California. The remaining 128 blocks were located in four basins farther north.

After the tentative selection of these blocks, the Department's Bureau of Land Management began to evaluate the potential environmental impact of oil and gas operations in the identified areas. The Bureau conducted a series of meetings in California, in which several state agencies participated, to identify the issues that should be discussed in the forthcoming draft environmental impact statement (44 Fed. Reg. 26215 (1979)). In April 1980, Interior issued the draft EIS and scheduled six more public hearings in California to discuss it (45 Fed. Reg. 30703).[8] The Bureau of Land Management also initiated consultations with the United States Fish and Wildlife Service and the National Marine Fisheries Service concerning the impact of OCS Lease Sale No. 53 on the species protected by the Endangered Species Act of 1973, 16 U.S.C. (& Supp. V) 1531 *et seq.*[9]

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[8] During the course of those hearings 745 persons commented orally and extensive written comments were received from the state, its coastal commission and numerous local governments (C.R. 85; A.R. 165w, 172w). The state's comments on the draft EIS primarily addressed potential operations in the four northern basins included in proposed OCS Lease Sale No. 53. The California Coastal Commission recommended removing three of the four northern basins from the sale and delaying the sale in the Santa Maria Basin and the one remaining northern basin (J.A. 76).

[9] The Fish and Wildlife Service subsequently issued a biological opinion "that your action, as proposed, is not likely to jeopardize the continued existence of the [southern] sea otter" (C.R. 85; A.R. 183w). The National Marine Fisheries Service also issued a "no jeopardy" biological opinion for the gray whale, which migrates through the proposed sale area (C.R. 85; A.R. 182w). Both agencies limited their "no jeopardy" opinions to the lease sale and exploration stages of the OCS process, and recommended further

In September 1980, Interior issued a final EIS addressing the potential environmental impacts from leasing all 243 tracts in the five OCS basins. One month later, on the basis of the EIS, the biological opinions of the Fish and Wildlife Service and the National Marine Fisheries Service, and the other data in the administrative record, the former Secretary of the Interior, Cecil D. Andrus, decided to exclude the four northern basins from Lease Sale No. 53.[10] On October 17, 1980, a proposed notice of sale was issued, limiting bidding to 115 tracts in the Santa Maria Basin (45 Fed. Reg. 71140). On October 24, 1980, Interior sought the recommendation of former Governor Edmund G. Brown of California as to the "size, timing or location" of the lease sale pursuant to Section 19(a) of the OCSLA, 43 U.S.C. (Supp. V) 1345(a).

In the course of these proceedings, the California Coastal Commission, on July 8, 1980, informed the Secretary of its conclusion that Lease Sale No. 53 was a federal activity directly affecting the California coastal zone within the meaning of Section 307(c)(1) of the CZMA, 16 U.S.C. 1456(c)(1). The coastal commission demanded a "consistency determination" from Interior that the lease sale would be "consistent" to the "maximum extent practicable" with its coastal zone management program (J.A. 63). The Department of the Interior reviewed the "possible effects of the department's pre-lease activities" and determined that the lease sale and the award of leases would not directly affect the California coastal zone (*id.* at 66). Interior thereafter notified the coastal commission of its negative determination and explained the reasoning

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consultation if development and production stages were ever reached (A.R. 182w, at 14).

[10] The data upon which this decision was based were compiled into a Secretarial Issue Document ("SID"), "an internal document intended to aid the Secretary in making decisions concerning lease sales" (Pet. App. 9a).

underlying that conclusion (*id.* at 66-68). 15 C.F.R. 930.35(d).[11]

In response to Interior's finding that Lease Sale No. 53 did not satisfy the threshold test of Section 307(c)(1) of the CZMA, the California Coastal Commission adopted a resolution on December 16, 1980, reiterating its view that the sale directly affected the coastal zone. The resolution acknowledged that, by removing the four northern basins from the sale, the Secretary had fully responded to the state's initial objections raised in its comments on the draft EIS (J.A. 76). The commission nevertheless concluded that 31 more tracts would have to be removed from the sale because "leasing within 12 miles of the Sea Otter Range in Santa Maria Basin would not be consistent" with the California Coastal Management Program (*id.* at 79). Although the commission made no findings justifying its selection of a 12-mile buffer zone, it asserted that the "national interest in protecting the small population of the threatened southern sea otter" outweighed the "petroleum resource potential of the 31 tracts * * *" (*id.* at 76-77). On December 24, 1980, Governor Brown similarly recommended the deletion of 34 tracts in the Santa Maria Basin that "are directly seaward of the habitat, breeding and food supply area of the Southern Sea Otter" (C.R. 85; A.R. 224w).

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[11] Interior's submission to the state addressed California's contention that the possible impact of exploration, development and production activities on the coastal zone were "direct effects" of an OCS lease sale. Interior explained that the possible effects of exploration, development and production activities were not "direct effects" of the lease sale, but rather of subsequent licensing procedures that were themselves subject to the consistency requirements of Section 307(c)(3) of the CZMA, 16 U.S.C. (& Supp. V) 1456(c)(3). This statutory framework, Interior reasoned, assures the state "that, by exercise of its own authority, only consistent activities will occur after the lease award" (J.A. 67). The state "does not have to reach out through Federal pre-lease consistency responsibilities, to limit sale proposals and thereby preclude energy development opportunities before specific activities are proposed or their specific coastal effects evaluated" (*ibid.*).

The new Secretary of the Interior, James G. Watt, issued a revised proposed notice of sale for Lease No. 53 on February 10, 1981. The Secretary reaffirmed his predecessor's intention to offer the 115 Santa Maria Basin tracts, and also proposed to offer the four northern basins previously deleted from the sale (46 Fed. Reg. 12436 (1981)). Interior again sought Governor Brown's recommendations pursuant to Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345 (Pet. App. 10a).

Reaction from the state was swift. On March 31, 1981, the California Coastal Commission resolved that leasing in the four northern basins would be inconsistent with the state's management program (J.A. 113). The commission declared that leasing the 31 northern tracts in the Santa Maria Basin was inconsistent with state law: "even if Interior issues a determination of consistency as the law requires, the proposed decision is *not* consistent with the [California Coastal Management Program] to the maximum extent practicable" (*ibid.*). The commission also asserted that leasing the disputed tracts in the Santa Maria Basin was contrary to the "national interest" (*id.* at 130).[12] By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning revised Lease Sale No. 53. The governor renewed his objections to leasing of the four northern tracts, and reiterated his position that the northern 34 tracts in the Santa Maria Basin should be excluded from the sale.

On April 10, 1981, the Secretary announced that Lease Sale No. 53 would go forward as to the 115 Santa Maria Basin tracts. The governor's recommendation that the northern 34 tracts be deleted from the sale was rejected because it did not provide a reasonable balance between the national interest and the well-being of the citizens

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[12] In response to the commission's resolution, Interior again explained that Lease Sale No. 53 did not "directly affect" the coastal zone within the meaning of Section 307(c)(1) of the CZMA (J.A. 133-134). The department, however, assured the

of California (J.A. 136). 43 U.S.C. (Supp. V) 1345(d).[13] The Secretary, however, delayed the offering of tracts in the four northern basins to permit a full examination of the governor's recommendation.[14] Accordingly, on April 27, 1981, Interior issued a final notice of sale, soliciting bids on all Santa Maria Basin tracts and establishing May 28, 1981, as the date of the lease sale (46 Fed. Reg. 23674).[15]

3. On April 29, 1981, the State of California filed suit seeking to enjoin the sale of 29 tracts in the northern portion of the Santa Maria Basin. A group of environmental organizations, led by the Natural Resources Defense Council, Inc., filed a substantially identical suit. The complaints alleged that the Department of the Interior had violated Section 307(c)(1) of the CZMA by failing to prepare a consistency determination for Lease Sale No. 53. Plaintiffs also asserted that the sale of the northern 29 tracts would be inconsistent with the state's coastal zone management program because of the possible effects of oil development activities on the sea otter.[16]

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coastal commission that its views would be considered by the Secretary (*id.* at 134).

[13] The Secretary's decision to reject the governor's recommendations made under Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, was upheld by the district court (Pet. App. 69a-70a) and the court of appeals (*id.* at 28a-29a).

[14] On August 7, 1981, the Secretary announced that the four northern basins would be officially removed from Lease Sale No. 53.

[15] Interior consolidated several of the tracts before issuing the final notice of sale. Thus, although the area offered remained the same, the number of tracts declined from 115 to 111. The number of tracts objected to by the coastal commission changed from 31 to 29, and the tracts that were the subject of the governor's recommendation declined from 34 to 32. See generally Pet. App. 10a.

[16] California's suit also claimed violations of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345; the Endangered Species Act of 1973, 16 U.S.C. (& Supp. V) 1531 *et seq.*; and the Marine Mammal Protection Act of 1972, 16 U.S.C. (& Supp. V) 1361 *et seq.* The environmental groups' complaint also contained these

The federal government contended that it was not in violation of its obligations under Section 307(c)(1) of the CZMA because Lease Sale No. 53 did not come within the terms of the statute. The government relied upon former Secretary Andrus' administrative determination, reaffirmed by Secretary Watt, that the lease sale had no "direct effects" on California's coastal zone (Pet. App. 10a). The potential effects of exploration, development and production activities on the OCS are not "direct" effects of the decision to conduct an OCS lease sale, the government argued, because those effects are the result of activities subsequent to the lease sale that are themselves subject to the consistency certification procedures of Section 307(c)(3)(B) of the CZMA.

On August 18, 1981, the district court entered summary judgment (Pet. App. 79a-81a) for California and the intervening local governments on their CZMA claim. The court ruled (*id.* at 62a-65a) that OCS Lease Sale No. 53 directly affected the coastal zone and the Secretary erred in not providing California with a consistency determination.[17] The court found that leasing directly affects the coastal zone because "leasing sets in motion the entire chain of events which culminates in oil and gas development" (*id.* at 46a). In the district

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allegations. The district court resolved these issues in the government's favor (Pet. App. 65a-78a). The court of appeals affirmed (*id.* at 25a-30a).

[17] The district court ruled that the environmental organizations "had no implied right of action to bring claims under the CZMA" (Pet. App. 30a). On appeal, the court of appeals reversed, holding that such organizations had standing under Section 10(a) of the Administrative Procedure Act, now 5 U.S.C. 702 (Pet. App. 31a). We did not raise standing as a separate issue in our petition because, as to this lease sale, the claims of the state and the environmental groups coincide. Because the state clearly has standing to pursue these issues, no live standing issue is presented. See *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981). We reserve the right to challenge the standing of non-governmental entities, including environmental organizations, in future CZMA cases.

court's view, the "direct effects" of a lease sale include all the potential activities that might take place during the later stages of the OCS oil and gas process. The court concluded that all the possible effects on the coastal zone listed in the environmental impact statement and the Secretarial Issue Document ("SID") prepared in conjunction with the lease sale were direct effects of the decision to lease (*id.* at 63a-65a). The district court therefore held that the tracts disputed by the state could not be leased until the Secretary prepared a consistency determination addressing the steps taken by him to insure that the sale would be consistent with the state's coastal management program.[18]

The Ninth Circuit affirmed (Pet. App. 82a). It ruled that an OCS lease sale directly affects the coastal zone within the meaning of Section 307(c)(1) of the CZMA because it establishes "the basic scope and charter for subsequent development and production" (Pet. App. 13a). To support this conclusion, the court of appeals adopted the district court's entire list of effects extracted from the EIS and SID prepared for Lease Sale No. 53 (*id.* at 12a-13a). The court of appeals reasoned that California's expansive interpretation of Section 307(c)(1)'s "directly affecting" threshold standard served the purposes of the Act better than the government's "narrow definition" because an OCS lease sale is "the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased" (Pet. App. 13a). Accordingly, it held that the Secretary of the Interior is required to prepare a consistency determination addressing all potential exploration, development and production activities prior to conducting an OCS lease sale.

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[18] The district court's injunction also declared that the bids received on the disputed tracts were "null and void" (Pet. App. 80a). The injunction was stayed pending appeal, and was ultimately modified by the court of appeals. As modified, the portion of the district court's order that voids the bids on the disputed tracts is stayed pending the preparation of a consistency determination by the Secretary of the Interior (*id.* at 24a).

SUMMARY OF ARGUMENT

1. Section 307(c)(1) imposes a consistency obligation only on federal activities "directly affecting" the coastal zone. The lower courts' conclusion that consistency review at the lease sale stage must encompass all potential impacts that might be hypothesized during the life of the entire OCS oil and gas process effectively amends the statute by deleting the "directly affecting" limitation. The possible future effects on the coastal zone of OCS exploration, development and production activities are not direct effects of the leasing decision because they are preceded by separate federal approvals that include CZMA consistency reviews.

An expansive construction of Section 307(c)(1) not only disregards the plain terms of the statute, it also conflicts with the legislative history of the section and upsets the proper federal-state coordination of the CZMA. The "directly affecting" threshold of Section 307(c)(1) was not drafted, as the court of appeals concluded (Pet. App. 14a), to expand the federal government's consistency obligations, but rather was the result of a congressional compromise designed to restrict the federal government's consistency obligations on federally owned lands within the physical confines of a state's coastal zone. The lower court's decision, therefore, takes a limitation that was designed to restrict federal consistency obligations within the coastal zone and recasts it as a broad expansion of federal consistency obligations for activities outside the coastal zone. Such an unforeseen result renders past federal input into approved state management programs superfluous, in clear disregard of the preapproval comment scheme designed by Congress to balance state and federal interests during the development of state management programs. The decision, moreover, unduly expands the states' substantive control over energy development activities on the OCS. Congress did not intend Section 307(c)(1) to grant the states a veto over the issuance of an OCS lease.

2. The lower courts' deletion of the term "directly" from Section 307(c)(1) disregards the decisionmaking regime painstakingly constructed by Congress for the development of resources on the outer continental shelf. In the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA, Congress recognized that there was insufficient information available at the outset of the OCS oil and gas process to properly balance environmental concerns against the nation's need for additional domestic energy resources. Congress therefore adopted a phased decisionmaking scheme whereby the decision to issue an OCS lease was separated from the later decisions to permit exploration, development and production activities. To avoid the making of any irretrievable commitment during the OCS oil and gas process, the Secretary was invested with broad powers to modify, suspend or even cancel leases at each stage of the process. By means of this regime, decisions regarding the risks and benefits of each stage in the OCS process are made at a time when there is optimal information available to assess adequately all available alternatives.

The task of integrating the consistency obligations of the CZMA into this decisionmaking regime is not difficult, inasmuch as Congress has addressed the question explicitly. In 1976, Congress rejected attempts to subject the issuance of an OCS lease to CZMA consistency requirements precisely because there was insufficient information available at that stage to assess whether possible future activities on the outer continental shelf would indeed be consistent with state management plans. Instead, Congress subjected the specific later exploration and production stages of the OCS development process to CZMA consistency review, thereby assuring that substantive consistency determinations will be made at a time when the actual impact of OCS development on the coastal zone can be accurately determined.

3. Limiting Section 307(c)(1) to federal activities that directly affect the coastal zone fully implements the

congressional objectives behind the CZMA. Contrary to the assumption of the court of appeals (Pet. App. 14a), the CZMA is not procedural in nature, nor is it designed primarily to facilitate yet another review of environmental factors, such as the one provided for by the National Environmental Policy Act. Rather, the CZMA is aimed at achieving substantive compliance, to the maximum extent practicable, with state coastal management programs. By requiring the government to make a substantive consistency determination at the very outset of the OCS oil and gas process, the decision below actually undermines this basic goal of the CZMA because there is simply insufficient information available at that stage to guarantee that all subsequent activities on the OCS will, in fact, be consistent with the state program.

Delaying CZMA consistency review to the later stages of the OCS development process, as Congress expressly provided in the 1976 amendments to the CZMA, assures the states that substantive consistency review will be made at a time when there is sufficient information to predict intelligently the impact that proposed activities might have on the coastal zone. Should a conflict with a state management program arise at these later stages, the state possesses adequate authority to prevent those activities from occurring. On the other hand, if CZMA consistency review is imposed on the issuance of an OCS lease, the national interest in full development of energy resources on the outer continental shelf may be thwarted, because the Secretary of the Interior may be precluded from issuing OCS leases on the basis of erroneous assumptions regarding the impact of hypothetical future activities on the OCS. Thus, restoring the statutory term "directly" to Section 307(c)(1) furthers the national interest in the expedited development of vital resources on the outer continental shelf without impinging upon the states' interest in the preservation, protection and development of the coastal zone.

ARGUMENT

In this statutory interpretation controversy, the parties have employed widely divergent approaches to ascertain the meaning of the threshold standard for federal consistency contained in Section 307(c)(1) of the Coastal Zone Management Act of 1972. The United States' position is grounded firmly on the plain meaning of the statute and gives effect to every word contained in that provision. Our interpretation of Section 307(c)(1), moreover, is supported by its legislative history and a functional analysis of how Congress intended the CZMA to operate. Equally important, our position harmonizes with the action of Congress in amending the Coastal Zone Management Act in 1976 and the Outer Continental Shelf Lands Act in 1978. By according Section 307(c)(1) its plain meaning, it is possible to integrate the Coastal Zone Management Act of 1972 into the unique decisionmaking process Congress created for oil and gas activities on the outer continental shelf, without derogating from the legislative policies underlying either the CZMA or the OCSLA.

I. SECTION 307(c)(1) LIMITS CONSISTENCY OBLIGATIONS TO THOSE FEDERAL ACTIVITIES THAT HAVE A DIRECT, IDENTIFIABLE IMPACT ON THE COASTAL ZONE

Section 307(c)(1) of the CZMA imposes consistency obligations only upon those federal actions "directly affecting the coastal zone." The decision of the court of appeals, however, subjects all OCS lease sales to the consistency provisions of Section 307(c)(1) notwithstanding the fact that the potential impacts of lease sales on a state's coastal zone are speculative, remote, and subject to further consistency review under Section 307(c)(3) of the Act. The court, in short, has accorded no meaning to the statutory term "directly." The court of appeals' construction of Section 307(c)(1) does not comport with the plain terms of the statute or its legislative history, and improperly alters the federal-state administration of the CZMA.

A. By its terms, the consistency requirement of Section 307(c)(1) comes into play only when federal activities *directly* affect a coastal zone. An OCS lease sale does not directly affect the coastal zone because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone. An OCS lease, moreover, specifically imposes a duty on the lessee to obtain state approval of any significant future activity that might impact the coastal zone. 43 U.S.C. (Supp. V) 1340(c), 1351(d). Thus, contrary to the decision below, the potential impacts upon a coastal zone attributable to the exploration, development or production stages of the OCS oil and gas process are not direct effects of a decision to conduct a lease sale. These potential impacts are, rather, the direct result of later federal approvals that can only be given following CZMA consistency review. 43 U.S.C. (Supp. V) 1340(c), 1351(d).

This Court recently rejected the contention that the statutory term "directly" has no "substantive effect" on the interpretation of a federal statute. *Bowsher* v. *Merck & Co.*, No. 81-1273 (Apr. 19, 1983), slip op. 8. To accept the contention that the term "directly" has no impact on the construction of a statute, the Court wrote, "would contradict the settled principle of statutory construction that we must give effect, if possible, to every word of the statute" (*ibid.*). In contravention of this "settled principle," however, the courts below simply ignored the term "directly" in Section 307(c)(1) of the CZMA.

Rather than address the plain import of the language of Section 307(c)(1), the district court dismissed the government's appeal to plain meaning as a "subterfuge" (Pet. App. 59a), and the court of appeals maligned the possible validity of a "narrow definition" (*id.* at 13a). But, despite the lower courts' attempts to avoid the issue, the fact remains that any conventional construction of the term "directly" is at odds with the conclusion of both courts. "The word 'direct' implies that the activity or

condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307 (1936). See also *Webster's Third New International Dictionary Unabridged* 640 (3d ed. 1971) (without any "intervening agency, instrumentality, or influence").

Far from having a proximate impact on the coastal zone, an OCS lease sale is "only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to * * * each [successive stage]." *North Slope Borough* v. *Andrus*, 642 F.2d 589, 593 (D.C. Cir. 1980) (emphasis omitted). While the possible impacts of exploration and production may be hypothesized at the lease sale stage, these potential effects are remote in time from the OCS lease sale and depend upon the discovery of oil or gas on the lease site. Equally important, these effects do not stem from the issuance of a lease, but from subsequent federal approval of exploration, development and production plans. Such approval, moreover, is expressly conditioned upon a state's concurrence with the consistency certification submitted by the lessee. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c), 1351(d). Therefore, the effects of an OCS lease sale on the coastal zone, including the ones noted by the courts below (Pet. App. 12a-13a, 62a-65a), are rather clearly "indirect," and the plain import of Section 307(c)(1) requires reversal of the court of appeals.[19]

B. The legislative history of Section 307(c)(1) also contradicts the court of appeals' conclusion that the statute generally applies to OCS lease sales. Indeed, the legis-

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[19] This conclusion comports with regulatory language developed under the National Environmental Policy Act of 1969. NEPA regulations define "direct effects" as those "which are caused by the action and occur at the same place and time," while "indirect effects" are those "reasonably foreseeable" effects that are "caused by the action" but "are later in time or farther removed in distance." 40 C.F.R. 1508.8.

lative history demonstrates that Congress drafted Section 307(c)(1) in an effort to restrict the federal government's consistency obligations for activities conducted within the physical confines of the coastal zone. It would be ironic to conclude that these efforts resulted in a marked expansion of the government's consistency obligations for activities undertaken outside the boundaries of the coastal zone.

When the CZMA was originally drafted in 1972, Congress focused primarily upon whether federal property physically located in the coastal zone—such as parks and military installations—should be subject to state coastal zone management programs. The bill passed by the Senate excluded federal property from the definition of the "coastal zone." S. Rep. No. 92-753, 92d Cong., 2d Sess. 8-9, 45 (1972). The House bill, by contrast, included federal property within the "coastal zone" definition. H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 2 (1972). Both bills, however, imposed consistency requirements only on federal activities "in" the coastal zone. H.R. Rep. No. 92-1049, *supra*, at 5; S. Rep. No. 92-753, *supra*, at 54. Thus, the House bill would have required consistency for *all* federal activities on federal lands located in the coastal zone; the Senate bill would have exempted government activities on federal lands from such a requirement. The conference committee created a compromise provision: it excluded federal lands from inclusion in the actual coastal zone, but provided that consistency would be required for those activities conducted on federal lands that "directly affect[]" the coastal zone. See H.R. Conf. Rep. No. 92-1544, 92d Cong., 2d Sess. 12 (1972) *reprinted in* Congressional Research Service, Library of Congress, 94th Cong., 2d Sess., *Legislative History of the Coastal Zone Management Act of 1972, as Amended in 1974 and 1976*, at 454 (Comm. Print 1976) (hereinafter *"CZMA Legis. Hist."*).

Although there is no explicit legislative history to explain the congressional intent behind this compromise,

it is evident that Section 307(c)(1) was drafted to serve a limiting function: to identify those activities on federal lands within the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements. Thus, contrary to the court of appeals' conclusion that Section 307(c)(1) was drafted to expand the consistency obligations of the federal government (Pet. App. 14a), the "directly affecting" threshold of the legislation was plainly designed to narrow the federal government's consistency obligations for activities conducted on federal lands within the boundaries of a state's coastal zone. And, a fortiori, that standard also limits the consistency obligations of the government for actions—such as OCS oil and gas leasing—that take place outside the coastal zone. The holding below that Section 307(c)(1) broadly expands the government's obligations outside the coastal zone, therefore, takes a limitation that was designed to restrict the government's obligations within the coastal zone and turns it inside out.[20]

C. The court of appeals' decision not only conflicts with the plain meaning and legislative history of Section 307(c)(1), it also jeopardizes the federal-state administration of the CZMA. The court's deletion of "directly

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[20] In enacting the Coastal Zone Management Act in 1972, Congress did not devote any detailed attention to the interrelationship between activities on the OCS and the proposed creation of state coastal zone management programs. However, attempts in both the Senate, see 118 Cong. Rec. 14183 (1972), and the House, see H.R. 14146, 94th Cong., 2d Sess. § 313 (1972), *reprinted in CZMA Legis. Hist., supra*, at 398, to extend the legislation beyond the territorial sea on the outer continental shelf were repulsed. The reason stated by the conference committee for declining to adopt an extension of the CZMA to the OCS was that it "would create potential conflicts with legislation already in existence concerning Continental Shelf Resources." H.R. Conf. Rep. No. 92-1544, *supra*, at 12. It is quite clear, therefore, that Congress in 1972 did not anticipate that the CZMA and its consistency requirements would have a substantial impact on federal activities on the OCS.

affecting" from Section 307(c)(1) negates, in large measure, the congressionally mandated preapproval procedure for state management programs and erroneously shifts the responsibility for controlling the development of resources on the outer continental shelf from the federal government to the states.

Because the federal government must comply with the substantive provisions of an approved state management program once the Section 307(c)(1) threshold has been crossed, federal agencies closely review and comment upon proposed state coastal zone management programs prior to their approval by the Secretary of Commerce. 16 U.S.C. 1456(a) and (b). Through this process, Congress anticipated that any aspect of a state's coastal zone program that was deemed to be impracticable by federal agencies would be "iron[ed] out" prior to approval. H.R. Rep. No. 92-1049, *supra*, at 20. A federal agency, however, cannot intelligently assess a proposed state management plan unless it knows which of its activities will be implicated by the state program, and the decision below effectively eliminates this guidance. The plain language of Section 307(c)(1) permits a federal agency to determine which of its activities will fall within the sweeping normative statements of a proposed plan: a state management program will affect only those federal activities that have a clear, immediate and identifiable impact on the coastal zone. But, under the approach of the court of appeals, federal activities come within a state coastal management plan so long as any possible impact on the coastal zone can be hypothesized. The result is that the congressionally ordained balancing of federal and state interests prior to approval of a state plan is thrown seriously out of kilter.[21]

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[21] The court of appeals' elevation of hypothetical impacts to the status of "direct effects" renders such a broad range of federal activities subject to the consistency requirements of Section 307(c)(1) that any "ironing out" of federal-state disagreements

Another troubling aspect of the decision below is that it gives coastal states undue authority over federal oil and gas activities on the outer continental shelf long before sufficient information is available to determine whether any particular OCS activity actually may be inconsistent with a state's coastal zone management program. Although California has consistently argued that application of Section 307(c)(1) to OCS lease sales merely furthers "intergovernmental coordination" (Resp. Br. in Opp. 17), the fact remains that the consistency requirements of that section are substantive, not procedural, in nature. Thus, far from simply "encourag[ing] cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone" (Pet. App. 14a), Section 307(c)(1), as construed by the court below, gives California a potential veto over a broad range of federal activities on the OCS not previously considered to be within the reach of state control.

Congress has "emphatically implemented its view that the United States has paramount rights to the seabed beyond" the limits of the territorial sea. *United States* v. *Maine*, 420 U.S. 515, 526 (1975). Both the Submerged Lands Act, 43 U.S.C. 1302, and the OCSLA, 43 U.S.C. (Supp. V) 1332(1), declare that the natural resources of the outer continental shelf "appertain" to the United States and are subject to its "jurisdiction and control." See also *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). Section 307(e) of the CZMA, 16 U.S.C. 1456(e), explicitly states that the Act does not diminish federal jurisdiction over submerged lands, and Congress has recently emphasized that

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on future state management programs may well be impossible. The decision, moreover, renders past federal agency input into approved management programs largely superfluous: the examining agencies plainly did not assume that a proposed state plan would control any federal activity possessing a foreseeable, albeit tenuous, link to the coastal zone.

the states do not possess "a veto power over OCS oil and gas activities" (S. Rep. No. 95-284, 95th Cong., 1st Sess. 78 (1977)). It is pellucidly clear, therefore, that the CZMA has not, sub silentio, altered or diminished the federal government's dominant role in determining which areas of the OCS should be offered for lease and when. As noted above (page 24, *supra*), the "directly affecting" standard of Section 307(c)(1) was designed to limit the federal government's consistency obligations on federal lands physically located within a state's coastal zone—it was not drafted to grant the states substantive control over federal actions on the outer continental shelf.

II. THE DECISION BELOW RUNS CONTRARY TO A CAREFULLY CRAFTED LEGISLATIVE SCHEME THAT FULLY INTEGRATES THE CZMA INTO THE OCS OIL AND GAS PROCESS

Following the enactment of the CZMA in 1972, the Arab oil embargo of 1973 precipitated renewed congressional action concerning the CZMA and the OCSLA. As the Court has previously recognized, "[d]uring the mid-1970's, the Nation's increasing dependence on imported oil focused public attention on the OCS as a potential source of domestic petroleum and natural gas." *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 (1981). The 94th Congress therefore considered proposals to amend both the CZMA and the OCSLA to respond to the demands of an expedited oil and gas leasing program on the OCS. These proposals were considered to be so interrelated that the concerned Senate committees held joint hearings on the proposed amendments to both statutes. *Joint Hearings on S. Res. 45 and S. Res. 222 Before the Senate Comms. on Interior and Insular Affairs, and Commerce*, 94th Cong., 1st Sess. (1975). See *CZMA Legis. Hist.*, *supra*, at 579. Only the amendments to the CZMA reached enactment in the 94th Congress, but, by 1976, the basic features of the OCSLA amendments as they were eventually enacted

in 1978 had also been formulated. Accordingly, the 1976 amendments to the CZMA were designed to mesh with the decisionmaking structure being created for the oil and gas program on the OCS, and the amendments to the OCSLA, in turn, contained coordinating provisions to ensure the effectiveness of the CZMA consistency regime. The court of appeals' decision, however, ignores this congressional prescription for application of the CZMA to the OCS oil and gas process.

A. In 1978, the Outer Continental Shelf Lands Act was substantially rewritten by Congress to promote " 'the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf.' " *Watt* v. *Energy Action Educational Foundation*, *supra*, 454 U.S. at 154 n.2, quoting H.R. Rep. No. 95-590, *supra*, at 53. In that measure, Congress recognized that the OCS oil and gas program is a unique federal undertaking because neither the government, the industry, nor the states can determine, at the outset, what actual oil and gas production activities (such as the placement of platforms and pipelines or the utilization of tankers) will eventually take place on the OCS. Unlike the case of a dam, road, or waterway project, the final contours of the completed activity cannot be predicted until the leasing and exploration processes are well under way. See *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980). Plainly put, the ultimate effects of issuing an OCS oil and gas lease depend not upon the contours of the lease sale but on the type, quantity and location of commercially valuable hydrocarbon resources discovered through exploration. Accordingly, Congress created a specially tailored federal decisionmaking regime by dividing the OCS process into separate and discrete stages. Under this system of phased decisionmaking, the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed at the later exploration or development and production stages.

Under the amended OCSLA, a lease does not directly authorize the lessee to explore for, develop or produce oil or gas. To engage in these activities, the lessee must seek separate federal approvals, first to explore for oil and gas and later to develop and produce the resource. 43 U.S.C. (Supp. V) 1340, 1351. As restricted by the OCSLA, a lease is a property interest that entitles the holder only to conduct certain preliminary surveys prior to submitting an exploration plan for approval (43 U.S.C. (Supp. V) 1340(c)(1); 30 C.F.R. 250.34-1). The "direct" effects of a lease sale, therefore, are extremely limited, and, by the express scheme of the statute, do not include the effects of potential exploration, development and production activities for which the lessee may eventually obtain approval.[22]

The final House report on the 1978 amendments explained the purpose behind prescribing this staged method of federal decisionmaking (H.R. Rep. No. 95-590, *supra*, at 164 (footnote omitted)):

> Section 25 is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

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[22] Other courts have recognized the limited nature of the lease sale decision, and have accordingly molded the obligations of other generally applicable procedural and substantive federal laws to the OCS process. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (NEPA does not require speculation regarding pipeline routes at the leasing stage of the OCS development process); *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (Endangered Species Act of 1973); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979) (NEPA). As the District of Columbia Circuit noted, "[m]andatory stage-by-stage review prevents the telescoping of any and every projected hazard to * * * the environment into one overwhelming statutory obstacle. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 600.

> The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known. In fact, the failure to have this procedure has led, in part, at least one court to invalidate an entire lease sale.

See also S. Rep. No. 95-284, 95th Cong., 1st Sess. 45 (1977). Thus, Congress dealt with the problem of incomplete information regarding OCS resources and the "onshore and environmental impacts of production activity" by altering the structure of federal decisionmaking. Rather than confronting every possible question regarding production at the lease sale stage, decisions would be made at later, specifically identified stages, when the maximum amount of information would be available.

Congress, moreover, added provisions to the OCSLA to insure that the Secretary could make meaningful decisions at the post-lease sale stages of the OCS process. The amendments authorized the Secretary to suspend operations or deny approval of exploration or development and production plans if sensitive environmental or coastal resources are endangered, see 43 U.S.C. (Supp. V) 1334(a)(1), 1340(c)(1), 1351(h)(1)(D); to extend the term of lease if these dangers may be mitigated over time, 43 U.S.C. (Supp. V) 1334(a)(2)(B), 1340 (c)(1), 1351(h)(2)(B); and to cancel leases if the dangers may not be resolved, 43 U.S.C. (Supp. V) 1344(a)(2). These provisions of the OCSLA specifically apply to a lessee's failure to satisfy the consistency requirements imposed by the 1976 amendments to the CZMA. 43 U.S.C. (Supp. V) 1351(h)(1)(B), (2)(A) and (B). It is to those amendments that we now turn.

B. As stated above, Congress initiated efforts to amend the CZMA in conjunction with proposals to amend the OCSLA. The 1976 amendments to the CZMA were designed to "address[] a need not foreseen in the 1972 legislation—that of energy development on the Outer Continental Shelf * * *" (122 Cong. Rec. 6109 (1976) (remarks of Rep. Lent)). And, while Congress initially proposed consistency review at the lease sale stage of the OCS process, it ultimately rejected that approach in favor of a phased system compatible with the structure of decisionmaking under the OCSLA itself.

Bills introduced in both the House and the Senate in 1975 proposed modifying Section 307(c)(3) of the CZMA by inserting the word "lease" into the statutory term "license or permit," and adding Section 307(c)(4), which would have required an applicant for an OCS lease to certify consistency with a state management program if its activities "directly or indirectly affect[ed] the coastal zone." H.R. 3981, 94th Cong., 1st Sess. 3 (1975), *reprinted in CZMA Legis. Hist.*, *supra*, at 801; S. 586, 94th Cong., 1st Sess. 3 (1975), *reprinted in CZMA Legis. Hist.*, *supra*, at 605. The bills that were reported out of committees in both Houses eliminated Section 307(c)(4), but retained the proposal to insert the term "lease" into Section 307(c)(3). S. Rep. No. 94-277, 94th Cong., 1st Sess. 59 (1975); H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 4 (1976). The Senate report stated that the addition of the term "lease" to Section 307(c)(3) would mean:

> [i]n practical terms * * * that the Secretary of the Interior would need to seek the certification of consistency from adjacent state governors before entering into a binding lease agreement with private oil companies.

S. Rep. No. 94-277, *supra*, at 19-20. The amendment of Section 307(c)(3), as proposed, was adopted by the Senate. 121 Cong. Rec. 23085-23086 (1975).

The Executive Branch, however, opposed the proposed amendment of Section 307(c)(3) on the same ground

that eventually persuaded Congress to adopt a phased decisionmaking procedure in the 1978 amendments to the OCSLA: lack of information at the lease sale stage of the OCS development process. As an official of the Department of the Interior testified before the House committee that was considering the amendment (*Coastal Zone Management: Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess., Pt. 1, at 204 (1975) (statement of Royston C. Hughes, Assistant Secretary of the Interior)):

> Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and has no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease. It is like a chicken-and-egg situation, from ou[r] point of view.

While the committee reported the amendment favorably (see H.R. Rep. No. 94-878, *supra*, at 52-53), it was deleted on the floor of the House. 122 Cong. Rec. 6128 (1976). The sponsor of the floor action, Representative Dupont, explained that "existing law" (*i.e.*, Section 307 (c)(3)) required consistency compliance whenever "a permit or license is granted by the Federal Government to perform offshore drilling." 122 Cong. Rec. 6128 (1976). The committee bill would "bring the leasing of offshore oil sections within the same framework." *Ibid.* But, because it was not "quite clear as to what effect that would really have on offshore oil tract leasing procedures," he urged the House to delete the amendment to allow the conference committee to study the matter further. *Ibid.*[23]

[23] In Representative Dupont's words, deletion would provide "a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would

As is evident, the focus of this discussion rested solely on whether the consistency requirements of Section 307(c)(3) should be applied to the leasing stage. No one suggested that the consistency provisions of Section 307(c)(1) applied to lease sales or that insertion of the term "lease" into Section 307(c)(3) might be redundant or duplicative of the Section 307(c)(1) requirement.[24]

The conference committee, after further study, did not restore the proposed language to Section 307(c)(3). Instead, it created a new subsection to that provision that required lessees seeking federal approval of exploration, development and production plans to first comply with CZMA consistency certification requirements. Section 307(c)(3)(B), 16 U.S.C. (& Supp. V) 1456(c)(3)(B). The conference report explained the legislative intent behind this action (S. Conf. Rep. No. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30 (1976)):

> The conference substitute * * * specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. The provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.

The conference substitute was enacted by Congress as a special consistency provision for oil and gas leases on the OCS. 16 U.S.C. (& Supp. V) 1456(c)(3)(B). This special provision, moreover, was subsequently integrated into the 1978 amendments to the OCSLA, 43

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be more beneficial and at the same time protect the rights of the States" (122 Cong. Rec. 6128 (1976)).

[24] Indeed, the prevailing view prior to the 1976 amendments was that Section 307(c)(3) alone applied to the issuance of OCS leases. See 122 Cong. Rec. 6128 (1976) (remarks of Rep. Murphy). See also Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 Stan. L. Rev. 1107, 1142 (1976).

U.S.C. (Supp. V) 1340(c)(2), 1351(d), 1351(h)(1)(B), and the legislative history of the 1978 OCSLA amendments reveals the care and attention with which Congress developed OCSLA provisions to fully integrate the two statutes.[25] Congress, therefore, spelled out in detail how the consistency procedures of the CZMA would be applied to the OCS process. Instead of explicitly subjecting potential exploration, development and production activities to consistency requirements at the lease sale stage, Congress conditioned those future activities on satisfaction of consistency requirements applied at the specific stages of the ongoing OCS oil and gas process.[26]

The 1976 amendments to the CZMA and the 1978 amendments to the OCSLA thus represent a congressional repudiation of the court of appeals' conclusion that all the potential effects of OCS lease sales are subject to CZMA consistency review at the lease sale stage. At first blush, the congressional committees in 1976 thought that consistency review at the OCS leasing stage was desirable. But, when acquainted with the practical consequences of such a requirement and the impossibility of satisfying it in a meaningful manner, Congress ultimately rejected

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[25] See, *e.g.*, H.R. Rep. No. 95-590, *supra*, at 168 ("[i]f a plan is disapproved because lessee cannot demonstrate compliance with * * * Federal 'consistency' requirements * * * the Secretary may cancel the lease"). See also S. Rep. No. 95-284, *supra*, at 83-84; H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 101, 118-119, 156 (1978). The conference report also rejected a consistency standard applicable to the five-year leasing program. *Id.* at 156. Instead, it required the Secretary to "consider" state coastal zone plans in creating the five-year program. *Id.* at 105.

[26] Indeed, the only hint that Congress contemplated that *any* consistency requirement would apply at the lease sale stage of the OCS oil and gas process appears in a footnote to the House report on the 1978 amendments to the OCSLA. There, without analysis, the report states that "under the [CZMA] * * * certain OCS activities including lease sales and approval of development and production plans must comply with 'consistency' requirements * * *." H.R. Rep. No. 95-590, *supra*, at 153 n.52.

that approach. Instead, it substituted special consistency requirements specifically designed to mesh with the structure of the forthcoming amendments to the OCSLA. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d). By expansively defining "directly affecting the coastal zone" and requiring a consistency determination at the leasing stage for potential OCS exploration, development and production activities, the court of appeals has adopted an approach that Congress expressly considered and rejected. The lower court's construction of Section 307(c)(1) is clearly a "creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 141 (1981).

C. In the face of the clear legislative scheme outlined above, the State of California has been forced to rely upon a discarded administrative interpretation of Section 307(c)(1) and recent, post-enactment legislative reports to support its expansive reading of the term "directly affecting" (Resp. Br. in Opp. 22-23). But, in spite of the lower court's reliance on these sources (Pet. App. 15a-17a), they offer little support for California's construction of Section 307(c)(1).

1. The National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce is the federal agency charged with the responsibility of promulgating regulations implementing the CZMA. See 16 U.S.C. 1463. In 1978, NOAA issued final regulations containing the agency's administrative interpretation of Section 307(c)(1).[27] 43 Fed. Reg. 10510 (1978). The regulations substituted the word "significantly" for the statutory term "directly," and in turn defined "signifi-

[27] In 1976, NOAA issued proposed regulations that did not address Section 307(c)(1)'s threshold test, on the premise that the term "directly affecting the coastal zone" could "speak for itself." 41 Fed. Reg. 42878, 42880. In 1977, the agency reversed itself and issued a second set of proposed regulations that defined "directly affecting" in terms of "primary, secondary, and cumulative impacts," as those terms were defined by the Council of Environmental Quality's NEPA guidelines. 42 Fed. Reg. 43586, 43590, 43598.

cantly" in terms of "primary, secondary and cumulative effects on the coastal zone." *Id.* at 10511, 10519. The regulations, however, did not expressly extend Section 307(c)(1) to OCS lease sales. Although the agency had been requested during the rulemaking proceeding to declare that the issuance of a federal lease was subject to CZMA consistency requirements,[28] the preamble to the regulations noted the existence of some uncertainty as to whether an OCS lease sale was a federal "activity" subject to the requirements of Section 307(c)(1).[29]

The Department of the Interior objected to NOAA's dilution of Section 307(c)(1)'s "directly affecting" threshold, and asserted that its pre-leasing activities were not subject to the consistency provisions of the CZMA. The Department of Justice's Office of Legal Counsel ("OLC") was ultimately engaged to resolve the inter-agency dispute between NOAA and Interior. OLC determined that, although Interior's pre-leasing activities could, under appropriate circumstances, fall within the terms of Section 307(c)(1), NOAA had impermissibly lowered the section's threshold (J.A. 45-46). OLC rejected NOAA's assertion that the legislative history of the CZMA was " 'replete' with statements that Congress intended to cover all Federal activities capable of significantly affecting the Coastal Zone" (*id.* at 46). The opinion noted that

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[28] Following the issuance of the 1976 proposed regulations, NOAA was asked to declare that the issuance of an OCS lease fell within the "license or permit" provisions of Section 307(c)(3)(A) of the CZMA, despite the fact that Congress had refused to mandate that result in the 1976 amendments to the CZMA. 42 Fed. Reg. 43591 (1977). The agency responded that it was "considering a position" which treats pre-leasing activities on the OCS as "federal activities" subject to Section 307(c)(1) of the Act. 42 Fed. Reg. 43591 (1977).

[29] Although the preamble to the 1978 regulations is not specific regarding the source of NOAA's uncertainty, other federal actions, such as the issuance of licenses, permits, and non-OCS leases, were deemed subject to Section 307(c)(3) and not Section 307(c)(1) by the regulations. 43 Fed. Reg. 10523 (1978).

Congress had provided discrete standards to trigger the Act's consistency obligations, and concluded that, in light of this fact, "we are unable to concur in an interpretation that would dilute 'directly,' first to 'significantly' and then to 'primarily, secondarily, and cumulatively'" (*id.* at 46). The opinion unequivocally declared that "the conformity requirement of § 307(c)(1) applies only to the preleasing activities of the Department of the Interior *directly* affecting the Coastal Zone" (*id.* at 47; emphasis added). As a result of the OLC opinion, the portions of the 1978 regulations that substituted "significantly" for "directly" in Section 307(c)(1) were withdrawn (44 Fed. Reg. 37142 (1979)).[30]

This administrative history establishes two important, interrelated propositions. First, the suggestion that an OCS lease sale, regardless of its actual impact on the coastal zone, falls within the terms of Section 307(c)(1) was first raised administratively after Congress, in 1976, had determined *not* to subject the issuance of an OCS lease to CZMA consistency requirements. See pages 32-36 & note 28, *supra*. Second, the regulations relied upon by California and the court below (Pet. App. 16a) do not in fact address whether an OCS lease sale is an activity "directly affecting the coastal zone" (16 U.S.C. 1456(c)(1)) because those regulations diluted the Section 307(c)(1) inquiry into the materially different question of whether an OCS lease sale had any "significance"

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[30] The OLC opinion did not attempt to specify those circumstances in which pre-leasing activities would fall within the terms of Section 307(c)(1). The opinion concluded that the "question whether [these] activities *or any of them* directly affect the Coastal Zone is essentially one of fact" (J.A. 47; emphasis added), which OLC was not authorized to address. Since the issuance of the OLC opinion, the Department of the Interior has reviewed each OCS lease sale to determine whether it authorizes any activities that, without further federal approval, will affect the coastal zone. No such direct effects have been found for Lease Sale No. 53, and Interior's "negative determination" has already been delivered to the State of California. See pages 11-12, *supra*.

for the coastal zone. Thus, there is no basis for according NOAA's discarded interpretation of Section 307(c)(1) any substantial weight because, as the court below noted, there is no reason to assume "that the regulation 'implement[s] the congressional mandate in some reasonable manner'" (Pet. App. 17a, quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967)).

2. California also relies on language from House and Senate reports on the 1980 amendments to the CZMA, and on a 1981 resolution of disapproval directed at NOAA's most recent attempt to interpret Section 307(c)(1), to support its contention that Lease Sale No. 53 directly affects its coastal zone (Resp. Br. in Opp. 22-23). These legislative materials, however, have little relevance to the proper interpretation of Section 307(c)(1).

Following the OLC opinion and the subsequent withdrawal of its original regulations, NOAA, pursuant to an interagency agreement, again commenced a rulemaking proceeding to define the "directly affecting" threshold of Section 307(c)(1). See 46 Fed. Reg. 26656, 26659 (1981). Because of this ongoing administrative procedure, Congress did not attempt to refine Section 307(c)(1) in the 1980 amendments to the CZMA.[31] Indeed, both the House and Senate reports on that legislation acknowledged that congressional action would be premature inasmuch as the forthcoming regulations would clarify the meaning of "directly affecting the coastal zone." H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980); S. Rep. No. 96-783, 96th Cong., 2d Sess. 11 (1980). But, despite the fact that the 1980 legislation did not amend Section 307(c)(1), the House report contained language which suggested that the consistency obligation imposed by the section attached "whenever a Federal activity has a functional interrelationship from

[31] The 1980 amendments to the CZMA dealt primarily with reauthorization of the funding provisions of the CZMA. S. Rep. No. 96-783, 96th Cong., 2d Sess. 1 (1980).

an economic, geographic or social standpoint with a State coastal program's land or water use policies" or "when a Federal agency initiates a series of events of coastal management consequences" (H.R. Rep. No. 96-1012, *supra*, at 34).

Two weeks after this suit was filed, the long-awaited regulation defining Section 307(c)(1)'s "directly affecting" threshold was published for comment in the Federal Register. 46 Fed. Reg. 26658 (1981). In spite of the suggestions contained in the 1980 legislative reports, the regulation relied on the plain terms of Section 307(c)(1), as well as the 1976 and 1978 amendments to the CZMA and OCSLA, and provided that a federal activity directly affects the coastal zone if it "produces a measurable physical alteration in the coastal zone" or "initiates a chain of events reasonably certain to result in such alteration, without further required agency approval" (46 Fed. Reg. 26659-26660 (1981)). The proposed regulation was published in final form a few months thereafter (*id.* at 35253), but its existence was short lived. The 1980 amendments to the CZMA had added a "legislative veto" provision to the Act (16 U.S.C. (Supp. V) 1463a), and following the passage of a resolution of disapproval on a sharply divided 20-15 vote by the House Committee on Merchant Marine and Fisheries (H.R. Rep. No. 97-269, 97th Cong., 1st Sess. 8-9 (1981)), the regulation was withdrawn. 47 Fed. Reg. 4231 (1982).

The court of appeals accorded the legislative materials set out above "substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants" (Pet. App. 16a). The course of events in 1980 and 1981, however, suggests just the opposite conclusion. To pretend that the 1980 committee reports or the 1981 majority report on the resolution of disapproval contain any reliable expression of the 1972 congressional intent regarding the proper construction of Section 307(c)(1) is to blink at reality. Because the 1980 amendments to the

CZMA did not alter or re-enact the consistency provisions of Section 307, the language inserted in the 1980 committee reports was unrelated to the legislation then before Congress. The membership of the relevant congressional committees, moreover, had significantly changed between 1972, 1980, and 1981, and the later committees cannot be presumed to have any special knowledge of the intent behind the original legislation.[32] The views expressed in the reports, furthermore, are only those of the majority of the members sitting on the committees themselves; those views were never directly voted upon by either House of Congress. Indeed, when the chairman of the House subcommittee was queried about the language of the 1980 report on the floor of the House, he replied that it was not intended to "modify the term directly affecting" (126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980)).

This Court has often stated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960); see also *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). This observation is especially apt here, where it is quite clear that the language of the 1980 and 1981 reports relied upon by the court below (Pet. App. 15a, 17a) represents " 'only the personal views of * * * legislators' " sitting on committees eight and nine years after Section 307(c)(1) was enacted. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), quoting *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967); *TVA* v. *Hill*, 437 U.S. 153, 193 (1978). As the dissenting members of the

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[32] Of the members voting on the 1981 resolution of disapproval passed by the House Committee of Merchant Marine and Fisheries, for example, only six (of 35) sat on the committee in 1972, and five of these six original members voted *against* the resolution. Compare H.R. Rep. No. 97-269, 97th Cong., 1st Sess. 8 (1981) *with* 1971-1972 Cong. Index (CCH) 3417.

1981 disapproval resolution stated, the legislative materials relied upon by the court below are "inconsistent with the previous action of Congress" and "should be dismissed as the dicta they represent" (H.R. Rep. No. 97-269, *supra*, at 16, 17).[33]

III. LIMITING SECTION 307(c)(1) TO ACTIVITIES THAT DIRECTLY AFFECT THE COASTAL ZONE FULLY IMPLEMENTS THE CONGRESSIONAL POLICIES BEHIND THE CZMA AND THE OCSLA

The court of appeals rejected the government's contention that Section 307(c)(1) "limits the scope of direct effects from a lease sale to those effects that 'are part of, or immediately authorized by, a lease sale'" (Pet. App. 12a) because, in the court's view, that "narrow definition" thwarts "a major purpose of the CZMA," *i.e.*, the involvement of the state "at an early stage of a significant and comprehensive activity * * * that will eventually have an appreciable impact on the coastal zone" (*id.* at 14a). The State of California has vigorously pursued this theme, suggesting that a prime goal of the CZMA is to encourage "intergovernmental coordination" (Resp. Br. in Opp. 17).

Despite its possible appeal on first glance, the lower court's construction of Section 307(c)(1) suffers from a

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[33] The dissenting members wrote that "the inclusion of all Federal OCS pre-leasing and leasing decisions in the consistency provisions of the CZMA is a reversal of Congress' earlier decisions during the 1976 amendments to that Act and the 1978 amendments to the Outer Continental Shelf Lands Act" (H.R. Rep. No. 97-269, *supra*, at 17). The dissenters noted that Congress, in considering the 1976 amendments to the CZMA, had deleted an amendment to Section 307(c)(3) of the Act "that would have specifically included all federal leasing activities in the consistency provisions of the Act," thereby "rejecting the notion that absolute consistency should apply in all cases during the planning for, and holding of, lease sales" (H.R. Rep. No. 97-269, *supra*, at 17). The dissenters concluded that the committee's disapproval of NOAA's attempt to confine Section 307(c)(1) to activities "directly affecting" the coastal zone "is completely contrary to these facts" (H.R. Rep. No. 97-269, *supra*, at 17).

fundamental—and fatal—defect: the immediate purpose of Section 307(c)(1)'s consistency requirement is not to provide coastal states with an opportunity to participate in the initial decisionmaking or planning stages of federal activities on the outer continental shelf. The states are provided ample involvement in these stages of the OCS oil and gas process by the express terms of the OCSLA, as the course of events in this case so vividly demonstrates. See pages 9-14, *supra*.[34] The CZMA is not, as California suggests (Resp. Br. in Opp. 15), simply another "environmental review statute[]." Far from merely facilitating consideration of environmental factors, the consistency provisions of the CZMA are designed to assure compliance, to the maximum extent practicable, with approved state coastal management programs. Thus, Section 307(c)(1) is concerned not with procedure, as the court of appeals assumed (Pet. App. 14a), but with substantive results.

Contrary to the conclusion of the court of appeals, limiting Section 307(c)(1) to activities that directly affect the coastal zone assures rather than defeats the congressional goal behind the consistency provisions of the CZMA. As noted above (page 7, *supra*), the issuance

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[34] California's contention (Resp. Br. in Opp. 17 n.27) that the lower court's construction of Section 307(c)(1) is necessary in order to give the state an opportunity to address its "broad[ ] concerns" regarding OCS oil and gas development is belied by the factual background of this case. As outlined in the statement (pages 9-14, *supra*), California has been provided with ample opportunity to express its concerns throughout the administrative preparation for Lease Sale No. 53. From the call for nominations through the drafting of the environmental impact statement and the requests for comments under Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, the state has repeatedly addressed "which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore construction should sensibly be located" (Resp. Br. in Opp. 17 n.27). It is plainly unnecessary to construe Section 307(c)(1) broadly simply to afford the state yet another opportunity to ventilate issues that have already been aired under the OCSLA and NEPA.

of an OCS lease authorizes only limited activities that, in general, will have no physical effect on the coastal zone. See 43 U.S.C. (Supp. V) 1340(b); 30 C.F.R. 250.34-1. In the usual OCS lease context, therefore, where the lease itself does not authorize activities with impacts reaching beyond the outer continental shelf, the CZMA consistency determination is deferred to a stage in the OCS oil and gas process when the actual effects of any exploratory or production activities on the coastal zone can be accurately assessed. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351 (d); S. Conf. Rep. No. 94-987, *supra*, at 30; H.R. Rep. No. 94-1298, *supra*, at 30. In this manner, the state is guaranteed that all activities on the OCS will, in fact, be consistent with the state's approved management program. Moreover, the national interest in the full development of energy resources on the outer continental shelf is also furthered because the OCS development process is not stalled on the basis of premature and erroneous speculation regarding possible on-shore impacts of, as yet, uncertain future activities.

The lower court's deletion of the term "directly" from Section 307(c)(1) upsets this careful balance between state and national interests, and does so without furthering the primary goal of the CZMA: assuring consistency with approved state management programs. A consistency determination made at the very outset of the OCS oil and gas process cannot guarantee that all subsequent activities will indeed be consistent with a state management program because, as Congress specifically recognized in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA (see pages 29-33, *supra*), it is impossible to fully evaluate the potential effects of exploration, development and production activities on the OCS prior to the lease sale. Among other uncertainties, the government does not know before a lease sale (1)

if specific tracts will actually attract bids;[35] (2) if bids are tendered, whether they will be accepted as representing the tracts' fair market value;[36] (3) if leases are issued, whether exploration plans will be presented for approval;[37] (4) if exploration plans are presented, what the content of those plans will be; (5) if exploration is approved, whether the lessees will invest in actual exploration activities;[38] (6) if exploration activities do take place, whether commercially recoverable accumulations of hydrocarbons will be discovered;[39] (7) if commercially valuable accumulations of hydrocarbons are discovered, what the type and quantity of these resources

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[35] In the 1954-1979 period, for example, only 46% of the tracts offered for sale actually received bids. Cabot Consulting Group, *DOE Contract No. DE-AC01-79RA85011, Competition on the Outer Continental Shelf and its Implications for Competition in Downstream Markets* 222 (July 14, 1980). In OCS Lease Sale No. 53, 81 of the 111 tracts offered received bids.

[36] Historically, only 41% of the tracts offered for lease actually result in leases. Cabot Consulting Group, *supra*.

[37] Depending upon a number of factors, including the bidding system used and the lessee's interest in other tracts in the area, a lessee may defer a decision on exploration pending the completion of preliminary testing on adjacent tracts. As a result of Lease Sale No. 42 in the North Atlantic, for example, 63 tracts were leased but only 26 exploration plans have been prepared. See *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 565 (D. Mass. 1983), appeal pending, No. 83-1258 (1st Cir.).

[38] While 26 exploration plans have been approved for the Sale 42 area, only eight exploration wells have been drilled. *Conservation Law Foundation* v. *Watt*, *supra*, 560 F. Supp. at 566.

[39] On the "frontier" areas of the OCS, exploration has to date been disappointing. The eight wells drilled in the Lease Sale No. 42 area were dry holes. *Conservation Law Foundation* v. *Watt*, *supra*, 560 F. Supp. at 566. No commercial quantities of oil or gas were found as a result of the MAFLA (Mississippi, Alabama, Florida) sale in the eastern Gulf of Mexico in 1972. See *Sierra Club* v. *Morton*, 510 F.2d 813 (5th Cir. 1975). Similar results were obtained from the Mid-Atlantic Baltimore Canyon sale considered in *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

will be;[40] and (8) if development and production plans are in fact submitted for approval, what the content of those plans will be. Faced with this series of sequential unknowns, the federal government simply cannot make a meaningful substantive determination at the lease sale stage that the coastal zone effects of all possible activities following the issuance of the lease will be consistent, to the maximum extent practicable, with a state's coastal zone management program.

In spite of the evident futility of making a substantive consistency determination at the outset of the OCS development process, California asserts (Resp. Br. in Opp. 16) that Section 307(c)(1) must apply to the issuance of a lease to assure "proper[] evaluat[ion]" of the "cumulative impacts of the oil and gas development which may occur under [an OCS lease]." This argument, however, again assumes that the CZMA plays a primarily procedural rather than substantive role. In the context of a procedural statute, such as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, an informed estimation of the possible impacts or effects of later occurring activities is altogether appropriate for the purpose of informing the decisionmaker of the potential consequences of his decision.[41] But, any attempt to satisfy a

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[40] The impacts of developing natural gas resources differ considerably from those associated with oil production. The quantity of the resources, furthermore, whether oil or gas, will dictate what transportation or processing facilities will be necessary.

[41] Indeed, the Environmental Impact Statements that are prepared in connection with all OCS lease sales perform the sort of analysis California asserts (Resp. Br. in Opp. 16) is necessary under the CZMA. A lease sale EIS projects a range of discoverable resource values, constructs hypothetical scenarios of the possible activities necessary to recover those resources (*e.g.*, the number and placement of pipelines, platforms, and tanker routes), and describes a variety of environmental impacts that might be associated with these hypothetical scenarios. See, *e.g.*, *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (NEPA requires a "hard look" at the environmental consequence of federal action but does not impose substantive limitations on that action); *Vermont*

substantive consistency limitation on future activities on the basis of speculation, like that contained in an EIS, will almost inevitably result in an erroneous decision.[42]

The present dispute between the State of California and the federal government illustrates this principle well. The California Coastal Commission objects to Interior's decision to lease 29 tracts in the Santa Maria Basin because, in its view, there is an unacceptably high risk that an oil spill on these tracts will adversely affect the nearby sea otter habitat. This conclusion, of course, ultimately depends upon two assumptions: (1) that there is oil in commercial quantities underlying those 29 tracts and (2) that the activities necessary to develop those tracts will result in an oil spill adversely affecting the sea otter. If, however, either of these assumptions is wrong, the state's consistency decision will also be erroneous. For example, if commercially valuable natural gas, but not oil, is discovered on those tracts, the perceived difficulty of an oil spill will not arise. Furthermore, even if a commercially valuable quantity of oil is discovered, it may be possible, based on the amount, type and location of the oil pool and the technology then available, to design a development plan that will reduce the risk of an oil spill to a level acceptable to the state. If such a plan is not possible, development may be deferred until conditions change, or, in the worst case, the lease may simply be cancelled. See 43 U.S.C. (Supp. V) 1351(h).[43]

Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538 (1978) (same).

[42] For example, pre-sale resource estimates are "inherently speculative" (Pet. App. 27a). Prior to actual exploration, any estimate of the actual on-shore impact of developing those resources will, more likely than not, prove to be faulty, and any substantive decision based on that estimate will suffer from the same defect.

[43] The lower court's decision inexplicably requires the federal government to evaluate the impact of OCS development on the sea otter under the CZMA, even though other courts have recognized

Thus, California's determination that the offering of 29 tracts in the Santa Maria Basin is inconsistent with its coastal management program (J.A. 113) could well be erroneous. If so, the national interest in OCS development will be thwarted without reason, since the Secretary will be precluded from offering these tracts for lease.[44] On the other hand, deferring the CZMA consistency determination to the later stages of the OCS oil and gas process, when the direct impact of any development activities can be accurately assessed, fully protects the state's asserted interests in the coastal zone. If a genuine concern for the sea otter habitat, or any

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that such an evaluation is impossible under the Endangered Species Act of 1973. In conformity with the phased decisionmaking procedure applicable to the OCS development process, biological opinions prepared for OCS lease under the ESA generally reach conclusions regarding the likelihood of jeopardy only as to the lease sale and exploration stages. Decisions concerning the development and production stage are deferred until information gathered through exploration is available. The biological opinion prepared for Lease Sale No. 53, for example, addressed only lease sale and exploration activities, and called for further consultation prior to the development stage. C.R. 85; A.R. 182w, at 4. This manner of satisfying the obligations of the Endangered Species Act of 1973 has been approved by the lower federal courts. *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980). See also *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979). Indeed, the district court below found that such phased compliance did not violate the ESA (Pet. App. 74a-75a), and the court recognized that it was requiring the United States to perform a task under the CZMA that was impossible or inappropriate under the ESA (Pet. App. 77a).

[44] In fiscal year 1982, the Secretary of the Interior accepted high bids totalling $3.171 billion from all OCS lease sales. Mineral Management Service, U.S. Dep't of Interior, *Outer Continental Shelf Oil and Gas Leasing and Production Program Annual Report: Fiscal Year 1982*, at 42. So far, the Secretary has accepted high bids totalling $6.882 billion from all offerings in fiscal year 1983. Mineral Management Service, U.S. Dep't of Interior, *OCS Lease Sale Statistics* (Draft July 1983). In Lease Sale No. 53 high bids totalling $2.038 billion were tendered. *Ibid.*

other coastal resource, materializes following the issuance of an OCS lease, both the federal government and the state retain ample power under Section 307(c)(3)(B) of the CZMA, 16 U.S.C. (& Supp. V) 1456(c)(3)(B), as incorporated by the relevant provisions of the OCSLA, 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d), to prevent the objectionable activity from even occurring and thereby assure full protection of the coastal zone.

At bottom, California does not trust the congressional determination contained in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA that intelligent, responsible decisionmaking in the OCS context can be achieved only by deferring significant determinations until the necessary information for those decisions becomes available. See, H.R. Rep. No. 95-590, *supra*, at 164. But, as the District of Columbia Circuit has stated, the "congressional mandate establishes a clear program for thoughtful, graduated, and tightly controlled development of oil lands on the outer continental shelf of the United States." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 594. California's premature application of the consistency provisions of Section 307(c)(1) to an OCS lease sale runs contrary to this phased decisionmaking process so painstakingly constructed by Congress in 1976 and 1978, and does not, in the end, serve the underlying purpose of Section 307(c)(1); there is simply inadequate information at the lease sale stage to determine whether all future activities on the OCS will in fact be consistent with California's management program.

The United States' interpretation of Section 307(c)(1) assures full compliance with the consistency provisions of the CZMA, preserves the phased decisional structure developed by Congress for OCS development, and maintains a proper balance between the national interest in OCS resource development and California's interest in the preservation of its coastal zone. Any action with an identifiable impact on California's coastal zone will be subjected to CMA consistency review at a stage when

there is sufficient information to permit a meaningful consistency determination, and, at the same time, the issuance of OCS leases will not be precluded on the basis of speculative assumptions regarding the possible onshore impacts of hypothetical future activities. Restoration of the term "directly" to Section 307(c)(1) of the CZMA, therefore, leaves California fully able "to preserve, protect, develop and whenever possible restore the resources of the coastal zone" (S. Rep. No. 92-753, 92d Cong., 2d Sess. 1 (1972)) without unduly fettering the congressionally mandated "expedited exploration and development of the Outer Continental Shelf" (43 U.S.C. (Supp. V) 1802(1)). See *Watt* v. *Energy Action Educational Foundation, supra*, 454 U.S. at 154 n.2.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Whether the lower courts properly determined that the "directly affecting the coastal zone" test of § 307(c)(1) of the Coastal Zone Management Act is met whenever a federal agency initiates a series of events of coastal management consequence, when that determination is supported by the purposes and legislative history of that provision, and whether, using that test, the lower courts properly determined that Outer Continental Shelf Lease Sale 53 is a federal activity directly affecting the California coastal zone.

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Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1983

JAMES G. WATT, Secretary of the Interior, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The dispute in this case, over the meaning of the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1),[1] and whether it requires a consistency determination for the Department of Interior's ("DOI") offshore pre-leasing and leasing decisions, originated as a disagreement within the federal government. The National Oceanic and Atmospheric Administration ("NOAA"), the agency within the Department of Commerce which is responsible for administering the Coastal Zone Management Act ("CZMA"), repeatedly asserted that the threshold test of

[1] 16 U.S.C. § 1456(c)(1).

§ 307(c)(1) should be liberally construed, and that DOI's Outer Continental Shelf ("OCS") leasing decisions required a consistency determination under that section.[2] DOI Pet. at 55a; 44 Fed. Reg. 37146, 37147 (1979). The Department of Interior, on the other hand, desired a restrictive definition of the threshold test, and sought an exemption for its OCS leasing activities.[3]

The dispute was submitted to the Department of Justice in 1979. The Department of Justice rejected DOI's argument that its leasing activities were exempt from § 307(c)(1), and agreed with the Department of Commerce that such activities were subject to consistency requirements.[4] Neverthe-

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[2]This Statement of the Case is abbreviated because the facts are fully set out in the District Court Opinion (DOI Pet. at 34a-40a), and in our Brief in Opposition to Petitions for Writ of Certiorari (pp. 1-8).

For the Court's convenience, we note at the outset several forms of citation that will be used throughout Respondent's Brief. The Outer Continental Shelf Lands Act Amendments of 1978 will be called "OCSLA." References to the opinions below are to those opinions as reproduced in the appendices to DOI's Petition for Writ of Certiorari, and will be cited as "DOI Pet. at . . . a." References to Petitioners' briefs will be "DOI Br. p. . . ." and "WOGA (Western Oil and Gas Association, *et al.*) Br. p. . . . ."

The brief of respondents County of Humboldt *et al.* will be referred to as "Local Gov't Br. at . . .". The brief of respondents Natural Resources Defense Council *et al.* will be referred to as "NRDC Br. at . . . ".

[3]Even prior to this specific dispute, there was disagreement over which agency should administer the CZMA. Although DOI actively sought CZMA administration, Congress gave it to the Department of Commerce and NOAA, based on that agency's superior expertise in coastal zone matters. See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 42, 49 (1972).

[4]Letter, April 20, 1979, from Leon Ulman, Office of Legal Counsel, Department of Justice, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of Interior (hereafter "DOJ Opinion"), J.A. 35, 36. The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to issue a consistency determination for the final notice of sale for Lease Sale 48 offshore Southern California. 44 Fed. Reg. 44590 (1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales (particularly Sale 53) the question of the applicability of § 307(c)(1) at the leasing stage. See 16 U.S.C. § 1456(h); 15 C.F.R. 930 subpart (G).

less, DOI refused to prepare a consistency determination for Lease Sale 53. J.A. 66, 133. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.[5]

California has always supported energy development where the benefits outweighed the risks. Although DOI's failure to issue a consistency determination invalidated the entire lease sale,[6] the state sought to limit its claims to only the most critical tracts in order to avoid impeding energy production. As a result, California sought an injunction on the basis of DOI's violation of the CZMA as to only 29 tracts in the sale.[7] These 29 tracts are extremely close to

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While the mediation was unsuccessful in producing any compromise, the mediator (the General Counsel of the Department of Commerce) concurred in California's view, calling the determination of the specific location in which to offer OCS leases "the key activity that creates a right to develop those leases," and noting that consistency review at the subsequent exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Memorandum, July 25, 1980 for the Secretary from, C. L. Haslam, General Counsel, Department of Commerce "Mediation of a Serious Disagreement between State of California and Department of Interior," attached to H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 82 *reprinted in* [1980] U.S. Code Cong. & Ad. News 7885, 7886 (hereafter referred to as "Mediator's Report"). He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 82.

[5]California did not seek a premature determination of inconsistency but sought only an order directing DOI to fulfill its consistency obligations under § 307(c)(1), *i.e.*, that DOI must issue a consistency determination. 15 C.F.R. § 930.37.

[6]As originally envisioned by Interior Secretary Watt, Lease Sale 53 included the entire coast of Central and Northern California from Santa Barbara County to the Oregon border. DOI Pet. at 37a-38a. Secretary Watt subsequently divided the area into two lease sales, and Lease Sale 53 was limited to 111 tracts off the Central California coast. *Id.* A typical OCS tract is 5,760 acres. 43 U.S.C. 1337(b)(1).

[7]These tracts contain only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter, May 1, 1981 to Governor Edmund Brown from James Watt, Secretary of the Interior, J.A. 144 (A.R. 461W).

(footnote continued on following page)

shore and are immediately adjacent to the coastal zone. Twenty-four of the tracts are within 12 miles of the coast, and all of the tracts range seaward from 3 to 24 miles offshore. DOI Pet. at 39a.

The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale. On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and

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California also sought to enjoin leasing of the disputed CZMA tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, the State's concerns included the negative effects on many valuable biological resources, fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. See, Letter, December 24, 1980, to Cecil Andrus, Secretary of the Interior, from Edmund G. Brown, Governor of the State of California, J.A. 89-95 (A.R. 224W).

Petitioners base this and other arguments on the Coastal Commission's Recommendation on Lease Sale 53 (J.A. 109). The main purpose of this document was to demonstrate that the Commission had serious concerns about the tracts at issue, and to show that a consistency determination was not academic.

DOI relies on this document to create the impression that California has already made the consistency determination. Fed. Br. pp. 46-47. However, as we will explain, it is DOI, not the state, that issues the consistency determination. The state then has the opportunity to disagree, and if so, the state and federal government are to try to resolve their differences. See Part IV, *infra*.

That process has never been followed in this case because of DOI's refusal to issue a consistency determination. Accordingly, all of WOGA's arguments concerning how the policies of the California Coastal Zone Management Program should or should not be applied (WOGA Br. pp. 8, 45) are simply not ripe for review, since those policies have never been applied by DOI in this case. See: Brief for the Cross-Petitioners pp. 10-22.

NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The other courts that have reviewed this issue have also held that DOI's OCS leasing decision requires a consistency determination under § 307(c)(1) of the CZMA. *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal. June 9, 1982); *Kean v. Watt*, No. 82-2420 (D.N.J. September 7, 1982), appeals pending No. 82-5679. As a result of the ruling in this case, DOI has now prepared consistency determinations for OCS lease sales for states throughout the country, including: Alaska, New Jersey, Massachusetts, Maine, New Hampshire, Rhode Island, Connecticut, New York, Maryland, Delaware, North Carolina, South Carolina, Florida, and, most recently, California.

SUMMARY OF ARGUMENT

Petitioners, DOI and WOGA, have sought to portray this as a case arising under the Outer Continental Shelf Lands Act. The majority of their briefing is devoted to the terms of that statute, and the authority OCSLA assigns to DOI. In their zeal to explore this topic, petitioners have largely overlooked the fact that this case arises under a different statute, § 307(c)(1) of the Coastal Zone Management Act. That section provides as follows:

> "Each Federal agency conducting or supporting activities *directly affecting the coastal zone* shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (emphasis added).

At the outset, it is important to bear in mind that the CZMA establishes a system of federal-state coordination and cooperation for the long-term management and protection of the coastal zone. DOI's OCS activities are only one

narrow group of federal activities which must fulfill the requirements of this Act. To view this as an OCSLA case, as petitioners suggest, would result in a skewed definition of the phrase "directly affecting the coastal zone," as used in the CZMA, and would seriously frustrate Congressional intent to have federal agencies ensure that their activities which impact the coastal zone are consistent with a national scheme for coastal zone management.

The question before this Court is: what did Congress intend by the phrase "directly affecting the coastal zone," the threshold test of § 307(c)(1) of the CZMA, and how was this test intended to apply in the context of oil and gas activities on the OCS. As to the "directly affecting" language, petitioners would have this Court resolve the meaning of this phrase by relying solely on the "plain meaning rule." However, petitioners' reliance on this rule is misplaced because the definition they offer is one of their own making. Their requirement of "physical impacts" on the coastal zone "prior to further federal approval" is nowhere to be found in the dictionary they cite.

The lower courts properly rejected petitioners' approach and attempted instead to determine congressional intent based upon all of the traditional sources: the language of the Act, its purposes and policies, the legislative history, and the interpretation of the agency charged with administering the Act. After detailed review, the lower courts properly determined that Congress intended the threshold test was met whenever a federal agency initiates "a series of events of coastal management consequence." DOI Pet. at 15a, 50a. Petitioner's definition is inconsistent with congressional statements about the meaning of the "directly affecting" test, and frustrates the purposes of the CZMA.

As to the question of how § 307(c)(1) should apply in the context of OCS oil and gas activities, the lower courts correctly found that Congress intended that CZMA requirements would apply to DOI's OCS pre-leasing and leasing

activities. DOI Pet. at 12a-13a, 51a. These congressional statements appear not only in the legislative history of the CZMA, but also in the legislative history of OCSLA, the very statute upon which petitioners rely to exempt federal OCS activities. Congress made clear that both OCSLA and the CZMA were intended to apply to DOI's activities at the lease sale stage.

Nor will the implementation of this clear congressional intent amount to a state usurpation of activities under federal jurisdiction. It is the *federally-approved* coastal zone management *program* with which the federal agency activities must be consistent. Respondents seek only the rights Congress has granted the states in order to implement the national interest in preserving and protecting the coastal zone. As NOAA concluded in 1979, "[f]ailure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities. . . ." J.A. 61 (emphasis added)

ARGUMENT.

I.

CONGRESS INTENDED AN EXPANSIVE CONSTRUCTION OF THE PHRASE "DIRECTLY AFFECTING THE COASTAL ZONE," WHICH IS MET WHENEVER A FEDERAL AGENCY INITIATES A SERIES OF EVENTS OF COASTAL ZONE MANAGEMENT CONSEQUENCE.

As the lower courts properly concluded, effectuating congressional intent should be the primary concern of the court in construing the meaning of disputed language. DOI Pet. at 41a. To construe and interpret § 307(c)(1), the lower courts properly considered the language of the statute, its purposes, the legislative history and the interpretation of the agency charged with administering the Act. DOI Pet. at 13a-18a, 41a.

A. Only a Broad Construction of the "Directly Affecting" Threshold Test Can Fulfill Congressional Purposes in Adopting the CZMA.

Effectuating the purpose of a statute is critical to the interpretation of disputed language. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The CZMA had its roots in the congressional determination, after several years of study, that legislation was necessary to protect, preserve and restore the nation's coastal zone. H.R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 9-11 (1972). Congress determined that the coastal zone is "the Nation's *most valuable* geographic asset." *Id.* at 9 (emphasis added).

However, the coastal zone was (and still is) threatened with rapid deterioration and irreparable damage based upon accelerating development, including the extraction of mineral resources and fossil fuels. H.R. Rep. No. 92-1049, *supra* at 1, 9; see also 16 U.S.C. §§ 1451(c),[8] (d), (e), (f), (g). As a result, Congress adopted the CZMA in order to "establish a national policy and develop a national program" for the long-term protection of valuable coastal zone resources.[9] H.R. Rep. No. 92-1049, *supra* at 1; S. Rep. No. 92-753, 92nd Cong., 2d Sess. 1 (1972); 16 U.S.C. §§ 1451(a), (b), (d), (e), 1452(1), (2).

In construing § 307(c)(1), it is essential to bear in mind that in order to protect the coastal zone, Congress selected a particular system of federal-state coordination and cooperative planning. See, *e.g.*, S.Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975). Thus, while the national coastal zone management program was to be developed by individual states, it was to be approved by the federal government, and it was to be administered through federal-state coordination. See, *e.g.*, 16 U.S.C. §§ 1451(i), 1452(2), (4);

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[8]The reference in § 1451(c) to extraction of mineral resources and fossil fuels was apparently intended to include a reference to OCS development, as indicated by the 1980 addition of § 1451(f). (Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060).

[9]These coastal zone resources may include, for example, fisheries, beaches, estuaries, wetlands, etc. 16 U.S.C. § 1453(2).

1456(b), (c); 1455(c)(1), (8). Federal agencies engaged in programs "affecting the coastal zone" were encouraged to cooperate and participate in this scheme. 16 U.S.C. § 1452(4).

Because state participation in this federal scheme was voluntary, Congress established certain incentives for the states. One was the promise of financial assistance to states in developing these coastal zone management programs. However, the most important incentive was the promise that once the federal government had approved the management program, that program would not be violated by the activities and development projects of individual federal agencies.[10] §§ 307(c)(1), 307(c)(2).[11] This promise, as articulated in § 307(c), is at the heart of the inter-governmental coordination provisions of the CZMA. See, *e.g.*, H.R. Rep. No. 96-1012, *supra* n. 10, at 34.

This view of the statute was recently confirmed by virtue of Congressional amendments to the CZMA in 1980. In explaining its amendments to the policy section of the Act (16 U.S.C. § 1452), Congress stated:

> ". . . an *expansive interpretation of the threshold test* [of § 307(c)(1)] is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act." H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) (emphasis added).[12]

[10]DOI Pet. at 43a; see, *e.g.*, H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) (". . . broad opportunities for states to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary state participation in the national program); see also H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 53 (1976).

[11]In addition to § 307(c)(1), § 307(c)(2) mandates consistency for federal development projects within the coastal zone as follows: "Any Federal agency which shall undertake any development project *in* the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(2) (emphasis added).

[12]Similarly, NOAA, the agency charged with administering the statute, has recognized that a determination that a federal activity directly affects the coastal zone has significant benefits. As a result, ". . . Federal agencies are encouraged to construe *liberally* the 'directly affecting' test in borderline cases *so as to favor inclusion of Federal activities* subject to consistency review." See 44 Fed. Reg. 37146, 37147 (1979) (emphasis added), see also J.A. 59-62.

In short, as the lower courts correctly concluded, the CZMA was intended to establish a national program for the long-term management and preservation of the coastal zone, and Congress chose to implement this program through a scheme of federal-state cooperation and coordination. Accordingly, the purposes of the statute would not be served by a narrow, restrictive construction of the "directly affecting" threshold test,[13] as DOI has proposed. To the contrary, such an approach to the statute would have the effect of eliminating federal-state coordination under the CZMA while at the same time immunizing federal programs from consistency review despite their adverse impacts on the coastal zone. See DOI Pet. at 45a. This approach would inevitably lead to further degradation of the coastal zone by the very agencies restricted by the statute, contrary to the result Congress sought to achieve.[14]

B. Congress Intended That the "Directly Affecting" Threshold Test Is Met When a Federal Agency Initiates a Series of Events of Coastal Management Consequence.

1. The Legislative History of the CZMA Contains Clear Guidance as to the Meaning of the Threshold Test.

In construing the phrase "directly affecting the coastal zone," it is important to bear in mind that this threshold test applies to a broad variety of federal agency activities and programs, and is not just limited to DOI's activities — let alone to DOI's OCS activities. Petitioners' narrow definition of the phrase (*i.e.*, that the federal activity must have a physical impact upon the coastal zone prior to further federal approvals) would not only thwart the purposes and

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[13]Although we will at times use a shorthand statement such as the "directly affecting" test, it is important to bear in mind that it is an entire phrase ("directly affecting the coastal zone") that must be construed.

[14]See, *e.g.*, S. Rep. No. 92-753, *supra*, at 19 (". . . the Committee deems it *essential* that Federal agencies administer their programs, including developmental projects, consistent with the state's coastal zone management program.") (emphasis added); see also S. Rep. No. 94-277, 94th Cong., 1st Sess. 36 (1975).

policies of the Act, but also is clearly at odds with congressional statements in the legislative history of the CZMA. The CZMA was adopted in 1972 and amended in 1976 and 1980.

The original House and Senate versions of § 307(c)(1) applied only to federal activities and development projects *in* the coastal zone. S. Rep. No. 92-753, 92nd Cong., 2d Sess. 54 (1972); H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 5 (1972). The Senate version of the Act made clear that federal lands were excluded from the definition of "coastal zone." S. Rep. No. 92-753, 92nd Cong., 2d Sess. 47 (1972).

However, in Conference, § 307(c)(1) was changed so that it was no longer restricted to federal activities within the coastal zone. Instead, federal activities outside the coastal zone would also be covered if they met the "directly affecting" threshold test.[15] The conferees agreed that:

> ". . . as to Federal agencies involved in any activities *directly affecting the state coastal zone* and any Federal participation in development projects *in the coastal zone*, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management plans." H.R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14 *reprinted in* [1972], U.S. Code Cong. & Ad. News 4822, 4824 (emphasis added).

At the same time, the conferees selected the definition of coastal zone that made clear that federal lands — including OCS lands — are outside the coastal zone. Nevertheless, "[a]s to the *use of such lands* [*i.e.* federal lands, including OCS lands] which would affect a state's coastal zone, the *provisions of section 307(c) would apply*."[16] H.R. Conf. Rep. No. 92-1544, *supra* at 12. This statement is more easily understood in light of earlier legislative history.

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[15]Section 307(c)(2) continued to apply only to federal development projects within the coastal zone. 16 U.S.C. § 1456(c)(2).

[16]Since § 307(c)(2) applies to federal development projects in the coastal zone, this statement was clearly a reference to § 307(c)(1).

In trying to understand the meaning of the "directly affecting" test, it is important to realize that Congress always expected federal lands to comply with consistency requirements when they had a "functional interrelationship" with the coastal zone. Indeed, this was the case even in early versions of the statute which applied consistency requirements only "in" the coastal zone. Congress indicated that it intended OCS lands and other

> "lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have a *functional interrelationship* from an economic, social or geographic standpoint with lands and waters within the coastal and estuarine zone, *should be administered consistent* with approved State management programs." See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 20, 30 (1971) (emphasis added).

The Conference Report change to the "directly affecting the coastal zone" test made clear that these federal lands (including OCS lands) were covered by consistency under § 307(c)(1) even though such lands were outside the coastal zone.[17]

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[17]Incredibly, DOI asserts that the § 307(c)(1) change from "in the coastal zone" to "directly affecting the coastal zone" had a "limiting function", *i.e.*, to "identify those activities on federal lands *within* the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." Fed. Br. p. 24 (emphasis added). This argument makes no sense for two reasons.

First, Congress' adoption of a definition clearly excluding federal lands from the "coastal zone" had already clarified this point. 16 U.S.C. § 1453(1). Thus, § 307(c)(2) as codified refers to federal development projects *in* the coastal zone without suffering from the ambiguity petitioners suggest. 16 U.S.C. § 1456(c)(2).

Second, this argument suggests that § 307(c)(1) addresses only federal activities on federal lands *within* the three mile limit. However, NOAA's regulations make clear that federal lands outside the coastal zone limits, including OCS lands, are encompassed by consistency requirements. 44 Fed. Reg. 37142, 37146 (1979). Similarly, the 1975

In 1976, Congress amended the CZMA further, but left § 307(c)(1) unchanged, and provided no additional insight as to the meaning of "directly affecting."[18] However, in 1980, Congress undertook a comprehensive evaluation of the CZMA. Despite oil company lobbying to alter § 307,[19] it decided to leave the consistency requirements intact. However, in light of the dispute that had arisen over the meaning of the § 307(c)(1) threshold test,[20] and because of industry requests for an amendment, both the House and the Senate discussed the meaning of the "directly affecting" test, and how it applies in the context of an OCS lease sale. H.R. Rep. No. 96-1012, *supra* at 34, 35; S. Rep. No. 96-783, 96th Cong., 2d Sess. 10-11 (1980).

The Committee reports pointed out that Congress had considered the phrase "directly affecting the coastal zone" during earlier Congressional deliberations, and found that this threshold test was met whenever a federal activity

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Senate Report makes clear that § 307(c)(1) includes ". . . activities *in or out* of the coastal zone which affect that area." S. Rep. No. 94-277, *supra* at 36-37 (emphasis added). DOI's argument was properly rejected by the lower courts, which concluded, like NOAA, that the change to "directly affecting" was an expansion, not a contraction. NOAA, "Issue Paper, Section 307(c)(1) — Defining the Term 'Directly Affecting' Found in Section 307(c)(1) of the Coastal Zone Management Act" (1981) at 5, Fed. Exh. L-1EE, C.R. 38. (Hereafter "NOAA Issue Paper").

Petitioners' argument does, however, make clear that they seek to read the "directly affecting" test out of the statute, and to rewrite § 307(c)(1) to again read "in the coastal zone."

[18]In 1976 Congress did amend another section, § 307(c)(3). This subsection applies to *applicants* for federal licenses and permits, but does not apply to the federal government. DOI has improperly relied on this change in a vain attempt to restrict its obligations under § 307(c)(1). See Part II, *infra*.

[19]See Testimony of Charles H. Barre on behalf of the American Petroleum Institute and Western Oil and Gas Association, in hearings before the Committee on Commerce, Science, and Transportation on S. 2622, to improve Coastal Zone Management and for other purposes (April 30, 1980) at 82, 85, 86.

[20]Congress was aware of the California-DOI dispute that went to mediation before NOAA in 1979. See Statement of the Case, *supra*. The Mediator's Report is cited in the 1980 legislative history and attached thereto. H.R. Rep. No. 96-1012, *supra* at 34, 82.

". . . had a *functional interrelationship* from an economic, geographic or social standpoint with a state coastal program's land or water use policies." H.R. Rep. No. 96-1012, *supra* at 34, (emphasis added). This is, of course, the same "functional interrelationship" test drawn from 1971, when Congress was drafting the Act.

The House Report indicated that this "functional interrelationship" test could be restated as follows:

> "Thus, when a Federal agency initiates a *series of events of coastal management consequence*, the intergovernmental coordination provisions of the Federal consistency requirements should apply." H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Accordingly, it is important to recognize that the meaning of "directly affecting the coastal zone" advanced by California, and effectively adopted by the lower courts[21] (*i.e.*, the functional interrelationship test as recently restated by Congress) is taken straight from the Congressional history of the CZMA.[22]

2. The Lower Courts Properly Determined That the Legislative History of the 1980 CZMA Amendments Must Be Considered and Given Significant Weight.

The legislative history of the 1980 CZMA amendments was given substantial weight by the lower courts because it contains the latest expression of congressional intent as to the meaning of § 307(c)(1), including significant statements regarding the very issue before this Court, *i.e.*, what is the meaning of the phrase "directly affecting the coastal zone," and how should it be applied within the context of federal OCS leasing activities.[23] DOI Pet. at 15a-16a; 50a-51a.

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[21]DOI Pet. 12a-13a, 51a.

[22]On the other hand, the definition offered by DOI and WOGA has no basis in the legislative history, and would thwart the purposes and policies of the Act. (See Part I-C, *infra*.)

[23]The OCS portion of the 1980 legislative history is addressed, *infra*, in Part II.

Nevertheless, DOI and WOGA urge that the reports be disregarded as "subsequent legislative history." In effect, they are asking the Court to accept their view of the statute and to ignore express statements of congressional intent. Their position is without merit.

First, the 1980 legislative history simply restates the test found in legislative history which dates back to 1971. The 1971 Senate Report states that consistency requirements apply to waters under federal jurisdiction, although outside the coastal zone, if they have a "functional interrelationship from an economic, social or geographic standpoint with lands and waters within the coastal zone." S. Rep. No. 92-526, 92nd Cong., 1st Sess. 30 (1971).[24] Because of its awareness of the dispute over the meaning of § 307(c)(1),[25] Congress in 1980 simply reiterated this "functional interrelationship test," while also providing an alternative method of phrasing the same test, *i.e.*, set in motion a series of events of coastal management consequence. In so doing, Congress did not alter the threshold test of § 307(c)(1), but merely confirmed it. H.R. Rep. No. 96-1012, *supra*, at 39.[26]

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[24]It must be remembered that Interior's Solicitor conceded that this is the one piece of early legislative history that explains the intent of Congress concerning what federal activities should be subject to § 307(c)(1) consistency. See Oct. 10, 1979, Memorandum to the Secretary of the Interior from Solicitor, "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Management Programs," at 4-5, Exh. L-BB, C.R. 38. The preamble to NOAA's regulations also recognizes that early legislative history applied the functional interrelationship test. 44 Fed. Reg. 37143 (1979)

[25]See H.R. Rep. No. 96-1012, *supra*, at 34, 82.

[26]As recently as 1981, NOAA pointed to this 1980 legislative history to demonstrate that Congress had restated its original intent regarding the "functional interrelationship" test, and had "further clarified the definition of 'directly affecting' by noting that the term was to be confined to instances where Federal agencies initiated a series of events which are linked to resource management consequences in the coastal zone." NOAA Issue Paper at 9.

NOAA also correctly pointed out that on the House floor Congressman Studds, Chairman of the Subcommittee on Oceanography and the principal architect of the 1980 amendments, emphasized that the House Report language was intended to clarify but not modify the meaning of the term "directly affecting." NOAA Issue Paper pp. 9-10. See also 126 Cong. Rec. H 10111-H 10112 (daily ed. September 30, 1980).

Second, in 1980 the House and Senate conducted a comprehensive examination of the CZMA. The 1980 amendments to the CZMA were entitled: "The Coastal Zone Management *Improvement* Act of 1980", Pub. L. No. 94-464, 94 Stat. 2060 (emphasis added). In specifying the purpose of the legislation, the House Report states:

> "The *primary purpose* of H.R. 6979 is *to reaffirm* the nation's commitment to the wise use and management of our coastal resources *through the coastal zone management program*.
>
> "In this, the Presidentially endorsed 'Year of the Coast,' the committee believes that the *reauthorization* and *strengthening* of the Coastal Zone Management Act of 1972 is both necessary and appropriate. . . .
>
> "The committee also believes that the amendments provided in H.R. 6979 will refocus the CZMA from the program development phase *to the implementation and enforcement phase* of state management efforts." H.R. Rep. No. 96-1012, *supra*, at 14-15; see also S. Rep. No. 96-783, *supra*, at 2-3 (emphasis added).

Pursuant to its oversight authority, the House Subcommittee on Oceanography of the Merchant Marine and Fisheries Committee expended a year's effort[27] in a comprehensive review to determine what changes were needed in the Act for the implementation phase,[28] and what sections, such as 307(c)(1), should remain unchanged. H.R. Rep. No. 96-1012, *supra*, at 30; see also S. Rep. No. 96-783, *supra*, at 2; 126 Cong. Rec. H10108 (daily ed. September 30, 1980).

Following this extensive analysis, the committees with Congressional oversight authority for the CZMA explained why § 307(c)(1) should *not* be amended or changed during

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[27]There were eleven hearings in the House alone. 126 Cong. Rec. H10108 (daily ed. Sept. 30, 1980).

[28]Obviously, there were no management programs in effect in 1972. As of 1980, nineteen states and territories had approved coastal management programs. S. Rep. No. 96-783, *supra*, at 2. Accordingly, in 1980 Congress focused its attention on the implementation of coastal management programs, as opposed to their development.

the implmentation phase despite oil company requests. Although many other sections of the Act were changed, the committees stressed the importance of continuing consistency requirements for federal activities which directly affect the coastal zone, specifically including DOI's OCS activities. The 1980 decision not to amend § 307(c)(1) was based on congressional understanding of what the "directly affecting" test meant, and how it applied to federal OCS activities, as these matters were explained in the 1980 legislative history. Only by giving weight to this legislative history can Congress' decision to leave this section of the Act untouched be understood.

Thus, the 1980 reports constitute the most recent legislative history for the CZMA, as it now stands. These reports should receive at least the same weight as given to the 1972 and 1976 reports.[29] This is especially the case because Con-

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[29]In claiming that the 1980 reports are the subsequent legislative history of committees, petitioners forget that they are relying in large measure on committee reports from 1976 and even 1978 (under a different statute, OCSLA), clearly subsequent to the enactment of the CZMA. Moreover, while the 1980 committee reports address the very section at issue here, § 307(c)(1) of the CZMA, the material cited by petitioners addresses either a different section of the CZMA or a different statute altogether.

Petitioners also argue that the 1980 committee reports were not voted upon by the entire Congress. DOI Br. p. 40. However, that is always the case with committee reports. As in the usual situation, it must be presumed that Congress had knowledge of the reports prepared by the committees with the expertise. The full Congress did vote on the 1980 amendments following committee oversight; if Congress were dissatisfied with § 307, there would presumably have been an attempt to amend it on the floor.

In any event, the debates indicate congressional awareness of the content of the 1980 committee report. 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980). Moreover, the Chairman of the House Subcommittee stressed, as had the committee reports, that nothing in the reports changed the meaning of "directly affecting." *Id.* Instead, the reports simply reflected Congress' longstanding understanding of the meaning of the term.

Thus, DOI's argument that these reports represent only the "personal view" of legislators (DOI Br. p. 40) is clearly incorrect. Moreover, petitioners have cited authority which is completely inapposite (for example where individual legislators inserted their views in the Congressional Record after passage of the act in question, or where the committee making the statement had no jurisdiction over the statute at issue). DOI Br. pp. 40-41.

gress in 1980 sought to focus the CZMA toward the implementation and enforcement of coastal zone management programs. The consistency requirements of § 307(c)(1) are obviously central to this implementation effort. In the absence of federal agency consistency, the ability of the coastal states to manage the coastal zone effectively and comprehensively would be completely undercut.

DOI and WOGA claim otherwise because Congress did not amend § 307 in 1980. Notwithstanding the absence of an amendment to the particular section of the act at issue, this Court has frequently relied on recent legislative history (including committee reports) because it demonstrated Congress' understanding that the issue before the Court had already been resolved. See, *e.g.*, *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Bell v. New Jersey*, ___ U.S. ___, 103 S.Ct. 2187, 2194 (1983). Similarly, in this case, the 1980 legislative history explains Congress' view that the "directly affecting" threshold test had always been equated with the 1971 "functional interrelationship" language, and that this language had always encompassed federal OCS leasing activities. Moreover, the Court has been specifically receptive to committee reports which, as in this case, are a product of congressional scrutiny of a statute pursuant to the committees' oversight function. *Administrator, Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 266 (1975).

In addition, Congress did adopt amendments in 1980 which relate to the issue before this Court. For example, Congress amended the policy section of the act having to do with cooperation of federal agencies. Pub. L. No. 96-464, § 303, 94 Stat. 2060, *supra*. The committee explained this change in the very section of the legislative history which discusses federal consistency under § 307(c)(1). H.R. Rep. No. 96-1012, *supra*, at 35.[30] In this respect, the 1980

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[30]The language in the House amendment to § 303(3) was enacted. H.R. Rep. No. 96-1012, *supra*, at 2; 16 U.S.C. § 1452(3).

legislative history can be viewed as contemporaneous.[31]

Even assuming, however, that the 1980 reports constituted subsequent legislative history, they should still be given significant weight in the search for legislative intent because they are clearly relevant. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. *supra*, at 596 (particularly when the precise intent of the enacting Congress is obscure); *Andrus v. Shell Oil Co.*, *supra*, 446 U.S. at 665-666, n. 8; *Bell v. New Jersey*, *supra*, 103 S.Ct. at 2194.

C. DOI's Interpretation of the Phrase "Directly Affecting the Coastal Zone" Is Not the "Plain Meaning" of the Phrase and Frustrates Congressional Intent.

As restated in DOI's brief, the "directly affecting the coastal zone" test is met only when the federal agency authorizes activities that ". . . prior to *further federal* approval and *review*, will have a *physical impact* upon [the coastal] zone." DOI Br. p. 21[32] (emphasis added). DOI contends that the lower courts erred in rejecting this definition because it represents the "plain meaning" of the words "directly affecting the coastal zone." DOI's argument must fail for several reasons.

The most obvious defect is that DOI's definition is not the "plain meaning" of the phrase at issue. Although DOI claims its definition represents the common understanding of the word "directly," this definition cannot be found in

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[31]Congress also adopted a 1980 finding which expressly included OCS activities among the activities which require coastal zone management. Pub. L. No. 96-964 § 302(f), *supra* n. 8. As discussed, *infra* p. 28, a good portion of the 1980 discussion of § 307(c)(1) was addressed to federal OCS activities. These remarks were also contemporaneous in light of the addition of this policy section.

[32]This is a slight rewording of the test as stated in Secretary Watt's April 28, 1981 letter rejecting California's request for a consistency determination as follows: a federal activity directly affects the coastal zone only when "changes to coastal resources or physical actions are possible without subsequent decisions or actions." J.A. 133. NOAA rejected this definition as "extremely narrow and restrictive." Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84; see also, NOAA Issue Paper at 8.

the dictionary upon which DOI purportedly relies.[33] Indeed, none of the dictionary definitions of the word "directly" require any sort of "physical impact," or the lack of subsequent approval and review.

The second obstacle petitioners face is that examination of the dictionary makes clear that there is no single meaning for the word "directly". The word "directly" has a variety of meanings which vary with the context.[34] The question

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[33]The District Court noted that *Webster's New International Dictionary* (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

"1. a. without any intervening space or time; next in order; squarely, exactly;
b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
c. without divergence from the source or the original;
d. simultaneously and exactly or equally.
3. in close relational proximity.
4. a. without any intervening agency or instrumentality of determining influence; without any intermediate step;
b. in the exact words of the original; verbatim.
5. a. in independent action without any sharing of authority or responsibility;
b. face-to-face, in person.
6. a. without a moment's delay; at once, immediately;
b. after a little, in a little while, shortly, presently." DOI Pet. at 58a-59a.

[34]Indeed, even if this case were to be decided based on Webster's definitions, respondents should prevail. For example, DOI can scarcely deny that the impacts of exploration and development activities are "next in order" or "in close relational proximity" to a federal OCS lease sale. As the trial court acknowledged, it ". . . would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not 'pumping oil.' " DOI Pet. at 77a.

Petitioners' favorite definition is based on the tort doctrine of "no intervening cause." As the District Court concluded, this doctrine was created to limit liability and has no relevance to a statute designed to foster intergovernmental coordination. DOI Pet. at 59a.

However, even this tort definition does not help petitioners. As the District Court observed, *Black's Law Dictionary* (5th ed. 1979) defines

here is the meaning of "directly" within the context of an entire phrase, "directly affecting the coastal zone", as used within the CZMA. That phrase is not defined in the statute, and can scarcely be characterized as clear and unambiguous, as the history of this dispute and NOAA's frustrated attempts to formulate a definition attest.[35]

In any event, the fatal flaw in petitioners' argument is that even if there were a "plain meaning" to the term at issue, it would not help them to avoid analysis of the legislative history which is so damaging to their position. While the starting point in every case involving construction of a statute is the language of the statute, the circumstances of enactment may persuade a court that Congress did not intend words of common meaning to have their literal effect. *Watt v. Alaska*, 451 U.S. 259, 265-266 (1981). When legislative history is available and relevant, the "plain meaning" rule

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an "intervening cause" as one which "turns aside the *natural sequence of events*, . . . produces a result which would not otherwise have been *reasonably anticipated* . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a, n. 16. The development of the tracts leased is certainly reasonably anticipated by both the lessor and the lessee. DOI Pet. at 61a. Indeed, that is precisely the reason that billions of dollars change hands in the course of an OCS lease sale.

To say that the direct effects of a lease are the intended uses of the property leased can scarcely constitute a departure from the "plain meaning" of the phrase "directly affecting the coastal zone." In short, the intermediate approval required for exploration or development/production under an OCS lease cannot be considered an "intervening cause." As a result, DOI has been forced to narrow the tort and dictionary definitions even further by adding irrelevant requirements such as "physical impacts."

[35]In 1978, NOAA equated the term "directly affecting" with "capable of significantly affecting." 43 Fed. Reg. 10511 (1978). This approach was rejected by the Department of Justice, and was subsequently withdrawn by NOAA. 44 Fed. Reg. 37142 (1979). Contrary to the impression created by DOI (pp. 35-36), California has never relied on this rescinded definition, and the lower court specifically rejected it. DOI Pet. at 56a, fn. 13.

Following mediation between California and DOI on the "directly affecting" issue, the Secretary of Commerce determined that a new rule defining the term should be issued. However, NOAA deferred issuance of a new regulation pending completion of the Coastal Zone Improvement Act of 1980. NOAA 1981 Issue Paper at 9. In 1981, NOAA did issue a definition of "directly affecting," but has now withdrawn that definition as well. See DOI Pet. at 17a-18a.

cannot be invoked to prevent its use, however clear the words may appear on superficial examination. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976). The controlling consideration is congressional intent, not dictionary definitions. See *Cass v. United States*, 417 U.S. 72, 77 (1974).[36]

Petitioners attempt to hide behind the "plain meaning" rule precisely because the legislative history makes clear that Congress intended an utterly different definition than the one they suggest, and that the threshold test is met when the federal agency initiates a series of events of coastal zone consequence. DOI's definition has nothing to do with the test posed by Congress and finds no support whatsoever in the legislative history. Not surprisingly, DOI is unable to cite a single piece of legislative history which would support its strained definition.

To the contrary, DOI's test contradicts legislative history. Rather than restricting effects to *physical* alteration of the coastal zone, Congress expressed an interest in a broad range of economic, geographic, social, aesthetic, and recreational impacts. H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No.

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[36]While *Bowsher v. Merck and Co.*, ___ U.S. ___, 103 S.Ct. 1587 (1983), is cited by petitioners (DOI Br. p. 21, WOGA Br. p. 35), it really supports respondents' position. In that case, this Court sought to determine the meaning of a different phrase ("directly pertain to and involve transactions relating to the contract") in a different statute. *Id.* at 1592. Although the Court's analysis began with the words of the statute, as is standard practice, it quickly shifted to an analysis of the legislative history of the statute and the Congressional purpose (*Id.* at 1592-1596), the very kind of analysis petitioners seek to avoid in this case.

The legislative history in the *Bowsher* case demonstrated that as originally introduced, the particular phrase at issue permitted access to "pertinent records." The author of the amendment adding the word "directly" in that particular statute specifically stated that his purpose was to limit the effect of the statute. *Id.* at 1592. On the other hand, in our case, the original language of the statute limited consistency to federal activities *in* the coastal zone. The change to "directly affecting" expanded the statute by extending consistency to activities *outside* the coastal zone. The *Bowsher* case clearly illustrates the necessity of determining what Congress intended by using "directly" in the CZMA, especially when the term is not defined in the Act.

92-526, *supra* at 10-11; see also 16 U.S.C. § 1451; 15 C.F.R. 923.13(b).

Similarly the requirement of no further federal agency approvals has nothing to do with Congressional intent. As Congress specifically indicated with respect to OCS activities, it contemplated that DOI's leasing activities must fulfill consistency requirements (under 307(c)(1)) *in addition* to the oil company/lessee consistency requirements that would follow at the exploration and development stages. H.R. Rep. No. 96-1012, *supra* at 28; S. Rep. No. 96-783, *supra* at 10-11. Congress intended consistency requirements to apply at *each* of these stages. *Id.* Indeed, to hold otherwise would contradict NOAA's regulations, which require consistency determinations for *each phase* of a major federal project, notwithstanding the fact that each subsequent stage is also subject to federal agency approval. See 15 C.F.R. 930.31(b), 44 Fed. Reg. 37146 (1979).

Instead of the broad, expansive test Congress desired (see Part I-A, *supra*), DOI has selected a narrow, restrictive definition. Instead of favoring *inclusion* of federal activities, DOI's definition is intended to *exclude* federal activities. The result of this approach, if permitted by this Court, is that a broad range of federal activities and programs would completely escape compliance with the CZMA, the direct opposite of what Congress intended in enacting the statute.[37]

Of interest on this point is that after this litigation commenced, NOAA suddenly adopted Interior's definition. 46 Fed. Reg. 26658 (1981); 46 Fed. Reg. 35353 (1981). Shortly after NOAA finalized its rule, resolutions of disapproval were introduced in both the House and the Senate. Following a vote by the House Merchant Marine Committee to disapprove the regulation, NOAA rescinded it. 46 Fed. Reg. 50937 (1981); 47 Fed. Reg. 4231 (1982); 47 Fed. Reg.

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[37]It must be remembered that the threshold test of § 307(c)(1) is not limited to OCS activities. Rather, the definition of this phrase applies to *all* federal activities in or out of the coastal zone.

20110 (1982). NOAA stated that it withdrew the regulation because of negative Congressional reaction, including the reaction of the committees with oversight responsibilities with respect to the CZMA. 47 Fed. Reg. 4231 (1982).

We submit that this history demonstrates that NOAA, the agency charged with administering the CZMA, concluded that its regulation implementing Interior's definition of "directly affecting" is contrary to Congressional intent.[38] It would hardly be appropriate under these circumstances to revive DOI's definition by reliance on the "plain meaning" rule. Indeed, as the lower courts found, the legislative history cited by respondents is clearly a far more reliable guide to Congressional intent than is DOI's contrived definition, which has no support in the legislative history and frustrates the purposes of the Act.

II.

CONGRESS INTENDED THAT FEDERAL OCS PRE-LEASING AND LEASING DECISIONS ARE INCLUDED AMONG THE FEDERAL ACTIVITIES WHICH MUST COMPLY WITH CONSISTENCY REQUIREMENTS UNDER SECTION 307(c)(1) OF THE CZMA.

Having considered what Congress intended by the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1), we now turn to the second part of the critical inquiry in this case: how did Congress intend this "directly affecting" test to apply in the context of federal OCS pre-leasing and leasing decisions.[39] This discussion is necessary because DOI and WOGA devote substantial portions of their

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[38] After chastising respondents for relying on the 1980 Committee reports, it is indeed ironic that DOI relies on the *minority* views of the House Committee report concerning the 1981 resolution of disapproval. DOI Br. pp. 40-41. In any event, DOI misses the point. The point is simply that NOAA apparently determined the regulation was wrong.

Nor is there any question of a "legislative veto" here. NOAA had always treated the statutory disapproval procedure [16 U.S.C. § 1463a] as no more than a "report and wait" requirement. 46 Fed. Reg. 35253 (1981).

[39] The effect and significance of the federal decision to lease OCS tracts is explained more fully in Part III. The decision includes a determination of where OCS development will occur (tract selection) and under what conditions (lease stipulations).

briefs to an attempt to establish an exemption from § 307(c)(1) for federal OCS pre-leasing and leasing activities (particularly tract selection).[40] However, petitioners' position is curious because it is inconsistent with their representations below. The Ninth Circuit stated: ". . . it is *conceded* on appeal that this section (§ 307(c)(1)) *does apply at the lease sale stage*." DOI Pet. at 12a[41] (emphasis added).

Moreover, this attempt to exempt DOI's pre-leasing and lease sale activities has been rejected by both the Department of Justice and NOAA[42] (see J.A. 36, 44-45, 58-59), in addition to every court that has considered this issue. The

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[40]See, *e.g.*, WOGA Br. p. 16; Fed. Br. p. 21 ("*An OCS lease sale does not directly affect the coastal zone* because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone.") (emphasis added).

On exceedingly rare occasions, DOI has applied consistency to the presence of a lease stipulation which requires a physical alteration of the coastal zone. WOGA Br. p. 26 n. 19. However, it should be understood that under DOI's definition of "directly affecting", federal OCS tract selection is invariably exempt from consistency review. Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84. Likewise, the question of whether stipulations should be added to protect the coastal zone is excluded from consistency requirements under DOI's test.

[41]At the Ninth Circuit oral argument, counsel for DOI stated ". . . we are accused of saying this provisions [sic], (c)(1), is inapplicable to leasing. *We do not take that position.* (c)(1) *is applicable* . . ." January 15, 1982 transcript of Ninth Circuit argument p. 10, lines 10-20 (emphasis added).

[42]Up until the commencement of this litigation, NOAA had consistently taken the position that federal OCS leasing activities fall within the requirements of § 307(c)(1). NOAA's repeated pronouncements to this effect are reviewed in some detail by the trial court. DOI Pet. at 55a-58a; see also, Memorandum of Eldon Greenberg, General Counsel, NOAA J.A. 58-59; see also NRDC Brief. The only NOAA regulations currently in effect are the ones adopted in 1979. These regulations do subject federal OCS activities to the consistency requirements of § 307(c)(1) (15 C.F.R. § 930.33(e)), and point out that application of consistency requirements to DOI's preleasing activities will lead to minimization of adverse environmental impacts. 44 Fed. Reg. 37142 (1979).

Although petitioners seek to confuse NOAA's position on this OCS issue with its discarded "significance" definition of "directly affecting" (DOI Br. p. 37), examination of NOAA's regulations makes clear that these issues are completely distinct. Long after NOAA abandoned the "significance" test, it continued to hold that DOI's pre-leasing and leasing activities required consistency review under § 307(c)(1). DOI Pet. at 56a, 57a; see also 44 Fed. Reg. 37142 (1979).

important point is that however the "directly affecting" test is defined, Congress has made clear that § 307(c)(1) was intended to apply to DOI's OCS pre-leasing and leasing decisions.

Examination of the 1972 legislative history contains some interesting insights on the application of §307(c)(1) to the OCS process. Although Congress made clear its recognition that the federal government retains paramount authority over all of its own lands, including OCS lands, it made equally clear that when activities on these lands directly affect the coastal zone, the federal activities must meet consistency requirements.[43]

We have previously addressed the fact that the early versions of § 307(c)(1) applied only to activities *within* the coastal zone. See Part I, *supra*. However, even at that time Congress intended to apply consistency requirements to federal lands outside the coastal zone where those lands met the "functional interrelationship" test. S. Rep. No. 92-526, *supra* at 20, 30. This easy legislative history makes clear that consistency requirements under the "functional interrelationship" test were intended to include federal OCS lands. *Id.* at 20.

This point was also made in the 1972 Conference Report. The Report discussed Congress' adoption of the Senate version of the definition of coastal zone, specifying that federal lands, including OCS lands, are excluded from the definition of coastal zone," and federal interests therein are retained. However:

> "As to the *use of such lands* [i.e. federal lands, including OSC lands] which would affect a state's coastal zone, the provisions of section 307(c) would apply." H.R. Conf. Rep. No. 92-1544, *supra* at 12.

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[43]NOAA's regulations reiterate that the retention of federal jurisdiction over submerged lands (§ 307(e)) was not intended to eliminate the requirement that activities on such lands fulfill consistency requirements under § 307(c)(1). 44 Fed. Reg. 37146 (1979).

In 1976, Congress amended the Act, but made no changes to § 307(c)(1).[44] However, there are some references to the applicability of consistency requirements to the federal decision to lease. For example, the Senate Report expressed concern that:

> "[t]here is very little communication between *Federal agencies* and the affected coastal states prior to major energy resource development decisions, such as the *decision to lease large tracts of the OCS* for oil and gas. . . . *Full implementation of the Coastal Zone Management Act of 1972* . . . could go far to institute the broad objectives of Federal-State cooperative planning *envisioned by the framers of the act.*" S. Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975) (emphasis added).

Furthermore, Congress in describing the federal OCS leasing activity stated:

> ". . . it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of 'federal consistency.' " H.R. Rep. No. 94-878, *supra* at 52, 53; see also S. Rep. No. 94-277, *supra*, at 36-37 (as to federal OCS activities, ". . . *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the state coastal zone and it has an approved management plan, the consistency requirements do apply.") (emphasis added).

In 1976, Congress did change another section of the act, § 307(c)(3). That section applies to *applicants* for federal licenses and permits. Congress considered adding the word "lease" to the phrase "license or permit" in § 307(c)(3), and determined not to do so. Congress did, however, add subsection (B) which specifically addressed the consistency responsibilities of an OCS lessee and applicant (*i.e.*, the oil company applying for specific permits) at the exploration, development and production stages.

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[44]The 1976 legislative history is addressed in depth in the Brief of NRDC.

Petitioners improperly infer from this change an intent to exclude *federal* OCS activities from coverage under § 307(c)(1). However, they overlook the elementary fact that federal OCS activities (pre-leasing decisions and the lease sale itself) can *only* be covered by § 307(c)(1). Section 307(c)(3) is restricted to consistency requirements for the *applicant* for federal licenses and permits, in this case, the oil companies.[45]

DOI has always argued that the addition of § 307(c)(3)(B) constituted the exclusive method by which OCS activities must comply with consistency requirements.[46] However, in 1979 the Department of Commerce disputed DOI's view, and the dispute was submitted to the Justice Department.[47] The Justice Department, like the lower courts, held that DOI's interpretation of this 1976 legislative history required an impermissible repeal by implication. J.A. 42-43, DOI Pet. at 48a. As the 1976 Conference Report explains, the addition of subsection (B) was intended solely to expedite consistency review for the oil companies' activities *after* the federal OCS lease sale was held. See H.R. Conf. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976); 122 Cong. Rec. 21230 (1976); see also DOJ opinion, J.A. 43. It had no impact on the federal lease sale and pre-lease sale decisions: *i.e.*, the selection of tracts and lease stipulations. J.A. 43.

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[45]As NOAA has interpreted the Act, (c)(1) is a residual category or catch-all category covering federal actions which are neither development progress under (c)(2), nor the activities of applicants for federal licenses and permits under (c)(3). 44 Fed. Reg. 37146 (1979)

[46]It should be observed that DOI's argument that the addition of § 307(c)(3)(B) exempts OCS leasing from the purview of § 307(c)(1) is completely inconsistent with its admission that § 307(c)(1) does apply to the agency's OCS leasing activities.

[47]NOAA's position is explained in a 1979 memorandum by its general counsel. Memorandum of Eldon Greenberg, J.A. 50-54. As NOAA pointed out, "neither the Administration nor Congress considered the question of exempting the Interior Department from its OCS pre-lease sale consistency obligations under section 307(c)(1)." J.A. 53. Indeed, the Department of Interior Solicitor's office conceded as much. J.A. 54.

Congress recently confirmed this. In explaining the effect of the 1976 addition of § 307(c)(3)(B), the 1980 Senate Report explains:

> "The Department of Interior's activities which *preceded lease sales* were to *remain subject* to the requirements of section *307(c)(1)*." S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Similarly, the House Report explained the 1976 addition of § 307(c)(3)(B) as follows:

> "This amendment removed the need to examine individual leases under the general license and permit consistency section. This change *did not alter Federal agency responsibility* to provide states with a consistency determination related to *OCS decisions which preceded issuance of leases*." H.R. Rep. No. 96-1012, *supra* at 26 (emphasis added).

The 1980 legislative history thus makes crystal-clear the fact that federal OCS pre-leasing and leasing decisions are covered by § 307(c)(1). The benefits of this system are explained as follows:

> "As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, *as the Department of the Interior sets in motion a series of events* which have consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.
>
> "The Committee sees no justification to depart from this view." S. Rep. No. 96-783, *supra* at 11 (emphasis added).

These statements are especially meaningful in light of Congress' addition in 1980 of a Congressional finding stressing the need to resolve conflicts caused by OCS and

other energy activities.[48] As will be set forth in more detail *infra*, these conflicts can only be resolved in a meaningful fashion (at the "earliest practicable time") if the federal government is not permitted to escape responsibility for its critical OCS actions.

Finally, the legislative history of the 1978 Amendments to OCSLA confirms this result. As will be explained in more detail *infra*, Part III-A, OCSLA's legislative history reiterates that OCS activities — including federal lease sales *and* subsequent approval of development and production plans — must comply with the CZMA. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 153 n. 52 (1977).

In short, Congress has made clear its intent that the federal pre-leasing and lease sale decisions, *i.e.*, the decision of what tracts to lease and pursuant to what conditions (lease stipulations), falls within the consistency requirements of § 307(c)(1).[49]

III.

DOI CANNOT ESCAPE ITS CONSISTENCY OBLIGATIONS UNDER THE CZMA BECAUSE ANOTHER STATUTE, OCSLA, ADDRESSES OCS DEVELOPMENT.

Having failed to convince the lower courts that DOI's OCS activities were exempt from the CZMA based upon the statute under consideration, petitioners have been forced to turn elsewhere. As a result, they now point to another statute, OCSLA, in hopes of persuading this Court that the

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[48]In 1980, Congress amended § 302 (16 U.S.C. § 1451) by adding the following finding:

> "(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation and industrial activities in the Great Lakes, territorial sea, and *Outer Continental Shelf* are placing stress on these areas and are creating the *need for resolution of serious conflicts* among important and competing uses and values *in coastal and ocean waters*." Pub.L. No. 96-464, *supra* n. 8 (emphasis added).

[49]Quite apart from the legislative history, effectuating the purposes of the Act requires this result. To hold otherwise would allow significant federal programs to completely escape consistency review, frustrating Congressional intent.

1978 Amendments to the OCS Lands Act somehow negated the requirements of the 1972 CZMA.[50] This argument was rejected by the Department of Justice and by NOAA, in addition to the lower courts. DOJ Opinion, J.A. 43-45; Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 54-57. Not only is it an impermissible repeal by implication, but the argument is also flatly contradicted by explicit Congressional history of OCSLA demonstrating that both the statutes were intended to apply to DOI's OCS leasing activities. *Id.*

Petitioners also suggest that because OCSLA requires staged decision-making, DOI should be able to defer its obligations until the stage when it has maximum information. This would, of course, be the exploration and development/production stages, when the leases are owned by private companies. However, it is too late at that stage to determine whether *DOI* should have selected these tracts for development in the first place. The fact is that DOI has a good deal of information at the lease sale stage (including an environmental impact statement), and that this is the very information that enables DOI to make its pre-leasing and leasing decisions. By the same token, coastal management programs can also be taken into account in reaching these decisions. To do so would effectuate Congress' clear intent to have DOI comply with consistency requirements in making its broad decisions at the lease sale stage (*i.e.*, what parts of the OCS should be developed and under what generic conditions) and to also have the oil companies comply with consistency requirements at the discreet subsequent stages in making the *specific* decisions on how an individual tract should be developed (*i.e.* where individual wells should be located, what equipment should be used, etc.).

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[50]WOGA is quite candid in this respect, stating that it is OCSLA, not the statute at issue, which should be given "initial scrutiny" in determining the meaning of language in the CZMA. WOGA Br. p. 21. This approach is, of course, contrary to every accepted tenet of statutory construction. In any event, petitioners' argument concerning OCSLA is, once again, completely inconsistent with their admission that § 307(c)(1) applies to DOI's OCS leasing activities. See p. 25, *supra*.

A. OCSLA Was Never Intended to Nullify the Requirements of the CZMA.

Petitioners suggest that because OCSLA addresses the development of OCS resources, that statute contains the exclusive statutory obligations of the federal government vis a vis OCS activities. The flaw in this argument is that apart from OCSLA, a broad variety of federal statutes apply on the OCS including NEPA, the Endangered Species Act, the Marine Mammal Protection Act, and the CZMA.[51] Not only is petitioners' assertion belied by the CZMA (Part II, *supra*) it is also contradicted by OCSLA, the very statute upon which petitioners seek to rest their claim.

Congress made this point clear in enacting a savings clause as part of the 1978 OCSLA Amendments as follows:

> "Except as otherwise *expressly* provided in this Act, nothing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972. . . ." 43 U.S.C. § 1866; H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 161 (1978) (emphasis added).

Moreover, § 19 of OCSLA is the section which specifically addresses states' rights at the lease sale stage under that statute. In enacting this section, Congress expressly stated that OCS activities at the *lease sale stage* must also comply with CZMA consistency requirements:

> "The committee is aware that *under the Coastal Zone Management Act* of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), *certain OCS activities including lease sales and* approval of development and production plans *must comply with 'consistency' requirements* as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify, or repeal any provision of the Coastal Zone Management

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[51]This point is addressed in more detail in the NRDC Brief. It should be noted that all of these statutes apply to DOI's lease sale activities.

> Act. Specifically, *nothing is intended to alter procedures under that Act for consistency* once a State has an approved Coastal Zone Management Plan.''[52] H.R. Rep. No. 95-590, *supra*, at 153 n. 52 (emphasis added).

Congress could not have made its intentions more clear. Congress intended that *both* OCSLA and the CZMA would apply at the lease sale stage.[53] This was confirmed two years after the 1978 OCSLA Amendments when Congress reenacted the Coastal Zone Management Act, flatly stating that § 307(c)(1) was intended to cover DOI's leasing activities. S. Rep. No. 96-783, *supra* at 11; H.R. Rep. No. 96-1012, *supra* at 28. Rather than repeal by implication, there is Congressional reaffirmation that DOI's leasing activities must comply with § 307(c)(1).

Nevertheless, petitioners assert that state participation under OCSLA is exclusive and eliminates any state influence on OCS decisionmaking under the CZMA. DOI Br. p. 42; WOGA pp. 23, 31-32. This is nothing more than a restatement of their argument that OCSLA negates the CZMA;

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[52]This Report is entitled to particular weight because the final bill followed the House version.

[53]Petitioners imply that since OCSLA makes consistency obligations explicit at the exploration and development/production stages, its failure to make these consistency obligations explicit at the lease sale stage confirms the exemption they seek. However, the legislative history of § 19 clearly lays such claims to rest, by making clear that OCSLA required the application of consistency requirements to federal OCS lease sales *and* to the subsequent stages.

In making the consistency obligations of the oil companies explicit at the subsequent stages, the 1978 Amendments to OCSLA merely attempted to parallel the references in § 307(c)(3)(B) of the CZMA. This had no effect on the residual *federal* activities covered by § 307(c)(1).

Moreover, a variety of federal obligations pertain at the lease sale stage despite the fact that they are not mentioned in OCSLA, and even though they apply at subsequent stages. For example, although not required by OCSLA's express terms, DOI prepares an EIS under NEPA at the lease sale stage, even though it may also have to do so at subsequent stages (and the OCSLAA reference to the subsequent stages is explicit, 43 U.S.C. § 1351(e)). Similarly, when endangered species are affected by OCS activity, federal agencies prepare an Endangered Species Act biological opinion at the lease sale stage *and* at the subsequent stages, even though OCSLA does not address this requirement. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980).

the fact is, that Congress intended the two statutes to complement one another.

As the trial court explained in some detail, both statutes may co-exist. DOI Pet. at 51a-55a. While OCSLAA primarily emphasizes development of the OCS, the CZMA is directed to environmental concerns, *i.e.* the long-term protection of the coastal zone. *Id.* The obligations and rights imposed by the two statutes differ but can be integrated.[54]

Section 19 of OCSLAA provides governors with the opportunity to make recommendations on the size, timing and location of a lease sale. It only applies, of course, where the governors do in fact make such recommendations. However, unless the governors' recommendations strike a reasonable balance between the national interest (as defined in OCSLA), and the local interest, they need not be accepted by the Secretary. 43 U.S.C. § 1345.

Unlike governors' recommendations under OCSLA, § 307(c)(1) of the CZMA applies in the first instance only to those states which actually have an approved coastal management program.[55] *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1379-1381 (2nd Cir. 1977). However, it is the federally approved *program* itself with which DOI's activities are to be consistent "to the maximum extent practicable." Thus federal agencies are required to consider

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[54]Indeed, Congress made clear that the two statutes are integrated in some way at *every* OCS stage. Although DOI need not comply with the consistency requirements of § 307(c)(1) during the earliest stage, formulation of a broad national leasing program, DOI is required to at least *consider* state coastal zone management programs in formulating the national leasing program. H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. at 103 (1978). However, at the lease sale stage, DOI is required to *comply* with the consistency requirements of § 307(c)(1). H.R. Rep. No. 95-590, *supra* at 153, n. 52; 1980 CZMA history, H.R. Rep. No. 96-1012, *supra*. At the subsequent stages, the oil companies are required to comply with consistency requirements regarding the specific activities in their exploration and development/production plans. 43 U.S.C. §§ 1340(c)(2), 1351(d); 16 U.S.C. § 1456(c)(3)(B).

[55]Congress intended to provide coastal states with federally approved coastal management programs with special status. As NOAA concluded, "[s]ection 19 was conceived as an *additional* protection for states." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 56 (emphasis added).

coastal management programs "as *supplemental requirements* to be adhered to in addition to existing agency mandates." 15 C.F.R. 930.32(a) comments; 44 Fed. Reg. 37146 (1979)[56] (emphasis added). Whether DOI's leasing decisions are in fact consistent will depend on the provisions of each approved program.

Thus, there may be cases where the CZMA applies but the governor does not object to a lease sale under § 19 of OCSLA, or the Secretary properly rejects the governor's recommendation because it does not strike the statutory "reasonable balance." There will be other cases where the governor makes a balanced recommendation, but the state does not have a federally approved coastal management program. However, even when both statutes are applied to the same sale, they are not inconsistent. The governor's recommendation may address a variety of issues which are not part of that state's approved coastal management program, and vice versa.[57] As the lower courts ruled, each statute addresses different Congressional goals, both of which can be given expression.[58] See Brief of NRDC. As WOGA has conceded:

> "Recognition of the primacy of the Secretary's authority at the leasing stage implied by Section 19 *by no means entitles a Secretary of the Interior to proceed with OCS leasing in disregard of state CZMA programs*." WOGA Br. p. 26 (emphasis added).

We agree.

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[56]It should be noted that under OCSLA, § 19 only applies *if* a governor makes recommendations to DOI. Under the CZMA, state recommendations are not a prerequisite.

[57]For example, a governor's recommendations can address non-environmental issues such as bidding procedures, drainage issues (43 U.S.C. § 1337(g)), etc., while the coastal zone management program must be specifically addressed to protection of the coastal zone.

[58]Petitioners can hardly question this since § 19 of OCSLAA also gives the governor the authority to submit recommendations on a proposed development and production plan (43 U.S.C. § 1345) even though such plans must also comply with CZMA consistency requirements (43 U.S.C. § 1351(d)).

B. OCSLA's Staged Decisionmaking Does Not Permit DOI to Escape Its Consistency Obligations at the Lease Sale Stage Simply Because the Oil Companies Have Separate Obligations at Subsequent Stages.

Petitioners tried to persuade the lower courts that DOI's CZMA consistency obligations at the lease sale stage were excused by virtue of the separate CZMA obligations of the oil companies at the subsequent stages pursuant to § 307(c)(3)(B). 16 U.S.C. § 1356(c)(3)(B). When this argument proved unavailing under the CZMA, they attempted to resurrect it in a new form under OCSLA; this time they argued that since OCSLA provides for staged decisionmaking, their obligations at the lease sale stage can be deferred until the subsequent stages.

The lower courts properly rejected this argument because, as has already been discussed, the legislative history of both OCSLA and the CZMA makes clear that Congress intended consistency requirements to apply both to DOI's pre-leasing and leasing decisions *and* to the oil companies' specific activities at subsequent stages. In any event, the argument must fail because DOI's OCS activities can only be reviewed for consistency when its pre-leasing and leasing decisions are made — which is, of course, at the lease sale stage.

At the outset, it is important to make clear what transpires at the pre-lease and lease sale stage. This is the time when, based upon all of the information it has gathered (including an Environmental Impact Statement), DOI makes its critical decisions as to what portions of the coast will be offered for lease (tract selection), at what time, and pursuant to what protections (lease stipulations). Few federal decisions could have more dramatic impacts on the coastal zone.

DOI's decision is essentially a subdivision of the OCS, creating both a right to develop and the conditions under which development can take place.[59] As the Ninth Circuit

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[59]Industry will not buy all the tracts nor will they find petroleum on all the leases they do buy. Nevertheless, DOI's decision to offer certain tracts (and not to offer others) sets the basic parameters on where there can be an industry right to produce, develop, and transport petroleum.

concluded, DOI's choices:

> "determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to dangers, the flow of vessel traffic, and the siting of on-shore construction." DOI Pet. at 13a; see also DOI Pet. at 45a, 62a-65a.

DOI's decision also defines where along the coast vessel collisions, well blowouts and other accidents may cause oil spills that can adversely affect coastal recreation areas, sea bird and marine mammal habitats, and other coastal zone resources — the very resources Congress sought to protect by enactment of the CZMA.

Accordingly, it is at the lease sale stage that the federal government itself deletes tracts because of environmental concerns, as Interior Secretary Andrus did for Lease Sale 48 offshore Southern California.[60] It is also at this stage that DOI imposes generic conditions on lessees that would protect coastal zone resources.[61]

While petitioners seek to portray an OCS lease sale as a mere transfer of paper, nothing could be further from the truth. An OCS lease is defined in OCSLA as a document which ". . . *authorizes exploration* for and *development and production* of minerals." 43 U.S.C. § 1331(c) (emphasis added). Although it is true that after receiving a lease the oil company must still obtain certain additional specific permits at the subsequent stages, the usual assumption is that once a federal OCS lease is issued, the lessee will be able to develop that tract. Indeed, the lessee is *required* to develop the tract within a set period of time or he will lose his rights. 43 U.S.C. § 1337(b)(2).

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[60]Letter, June 29, 1979, from Secretary Andrus to Governor Brown; see also Brief of Local Governments.

[61]See Memorandum, October 10, 1979, to Secretary from Solicitor, on "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Zone Management Programs" at 8; Exh. L-11, C.R. 3; *Alaska v. Andrus*, 580 F.2d 465, 471 (D.C. Cir. 1978), vacated in part as moot, 439 U.S. 922.

Thus, for example at the exploration stage, the lessee requests approval of his *specific* exploration activities, such as a description of the equipment he plans to use, the location of an individual exploratory well to be drilled, etc. See 43 U.S.C. § 1334(3). Later the oil company obtains approval for a development and production plan, again addressing the specific facilities and operations which will be constructed or utilized. 43 U.S.C. § 1351(a). At this stage, the exploration and development/production plans are only required to focus on the specific activities that will occur on an individual tract. 39 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). The question at these stages is not *whether* a particular tract should be developed, but *how* that particular tract should be developed.

By contrast, the time to determine *whether* a particular tract should be developed at all is at the lease sale stage. After the oil companies have spent billions of dollars to acquire property rights at a federal OCS lease sale,[62] it is a little late to be telling them, for example, that portions of the sale immediately adjacent to critical coastal zone resources should not be developed at this time, or that they should be developed only with certain protections (stipulations) for coastal zone resources.

In short, the time to consider *whether* development of an OCS tract can occur must be at the lease sale stage. The subsequent stages assume that this threshold decision has already been made, and the question at the later stages is *how* to develop the tract.[63]

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[62]As DOI pointed out, in Lease Sale 53 high bids totalling $2.038 billion were tendered. DOI Br. p. 47 n. 44. In fact, Chevron's bid for one tract alone was $333,600,000. *Los Angeles Times*, April 29, 1981, Part 1 at 1. It is ludicrous to argue, as petitioners have, that the oil companies expend these enormous sums of money at the lease sale stage for nothing more than the right to *apply* for permits at the later stages.

[63]Although petitioners seek to create the impression that federal OCS leases can be cancelled at will, the fact is that cancellation can occur only in exceedingly rare circumstances, and at major expense to the taxpayer. 43 U.S.C. § 1334. Furthermore, it was Congress' belief that disapproval of development and production plans "for environmental reasons would be *most unusual*." H.R. Rep. No. 95-590, *supra* at 169.

Furthermore, unless consistency requirements are applied at the lease sale stage, DOI's activity in the OCS process completely escapes consistency review. The federal OCS pre-leasing and leasing decisions can *only* be reviewed under § 307(c)(1). Acceptance of DOI's argument frustrates the purpose of the CZMA because federal programs directly affecting the coastal zone were intended to fulfill consistency requirements.

By contrast, at the exploration and development/production stages, the leases are in the hands of individual oil companies. At this point, any discussions about consistency must take place between the state and the holders of the leases of individual tracts; under normal circumstances, the federal government does not even participate in this process.[64] See 16 U.S.C. § 1346(c)(3)(B). As a result, consistency review is completely piecemeal, and there is no meaningful ability to address the cumulative effects of the sale as a whole on the coastal zone.[65]

Nevertheless, petitioners argue that it makes more sense to wait for later stages because more information is available at that time.[66] However, DOI itself makes decisions con-

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[64]The only exception is in the rare instance of an override of the state decision by the Department of Commerce. 16 U.S.C. § 1356(c)(3)(B). DOI, however, plays no part in this process.

[65]This point is addressed in more detail in the Brief of Local Governments. However, it can be illustrated by a history of the submission of oil company exploration and development plans for the Santa Barbara Channel between 1978 and mid-1981. See July 1, 1981 Affidavit of Mari Gottdiener, and Exhibits thereto. J.A. p. 152 *et seq.* At an OCS lease sale, individual oil companies acquire the rights to develop various tracts. Thereafter, these companies apply for consistency certification of their exploration and development plans at different times, and often for one tract at a time. For example, Chevron submitted the first plan in December 1978, followed by Exxon submittals in February and March 1979, Sun Production in May 1979, and so on for a total of twenty-seven separate submittals through June 1981. *Id.*

[66]The logical extension of this argument is that all OCS decisions would be deferred until the production stage, when information is maximized. WOGA implies as much, by suggesting that not even oil exploration (which, like oil development and production, can lead to oil spills) has much effect on the coastal zone. WOGA Br. p. 27, n. 21, p. 28. However, OCSLA does not permit such deferral. *State of California v. Watt*, 668 F.2d 1290, 1306 (D.C. Cir. 1981) (holding that DOI could not meet its obligations to properly plan the national five year OCS program in the context of a decision on the placement of a particular exploratory well). Neither does the CZMA.

cerning tract selection and lease stipulations at the lease sale stage on the basis of the best available information because this is the *only* time such decisions can be made.[67] By the same token, this is the only time when a determination can be made as to whether tract selection and lease stipulations are consistent with the coastal zone management program.[68] Although the continual collection and assimilation of pertinent information must continue throughout the OCS process, OCSLA itself requires that DOI at each stage base its decisions upon the best information available at that time. *State of California v. Watt, supra* n. 66, 668 F.2d at 1307.

The fact that OCSLA, like other federal statutory regimes, provides for staged decisionmaking does not allow DOI to escape its CZMA consistency obligations at any particular stage. To the contrary, NOAA's regulations require that where a federal agency engages in phased decisionmaking based upon developing information, a consistency determination is required for *each* major decision so that the agency can ensure that the project *continues* to be consistent. 15 C.F.R. § 930.37(c); 44 Fed. Reg. 37148 (1979). This is precisely what Congress said about the CZMA. S. Rep. No. 96-783, *supra* at 11.

Nor would the oil companies' consistency requirements at the subsequent stages be merely duplicative. The more specific information that is available at these subsequent stages will be needed to address the more specific issues that arise at these stages, *i.e.*, what specific equipment will be used, where platforms will be placed, etc. In short, the

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[67]Petitioners seek to minimize the extensive information available at the lease sale stage while at the same time emphasizing the years of study that precede DOI's lease sale decisions, commencing with the formulation of the National Five Year Leasing Program. They ignore the fact that an environmental impact statement is prepared at the lease sale stage which, along with supplemental information (see, *e.g.*, 43 U.S.C. § 1352), resource estimates, etc., provides DOI with information the agency believes is sufficient to make its leasing decisions.

[68]As the Department of Justice recognized in 1979 ". . . some of the pre-leasing activities of the Secretary will give rise to consistency problems which cannot be reviewed at all under the paragraph [307(c)(3)] (B) procedure, or for which such review comes too late." J.A. 43.

development of information under the stages of OCSLA is entirely appropriate to the decisions made at each stage, including the application of § 307(c)(1) at the lease sale stage.[69]

IV.
APPLICATION OF A CONGRESSIONAL SCHEME FOR COASTAL ZONE MANAGEMENT IS CONSISTENT WITH FEDERAL PARAMOUNTCY TO THE OCS.

Finally we must dispose of the issue that is at the bottom of all of petitioners' arguments. While Congress clearly desired to allocate the states certain limited rights in the OCS decisionmaking process, petitioners are dissatisfied with this congressional scheme. As a result, they attempt to alarm this Court by suggesting that the exercise of these states' rights is somehow contrary to the national interest and that it grants states an unintended "veto" which is inconsistent with paramount federal authority on the OCS. Petitioners are wrong on both counts.

Petitioners seek to create the impression that application of the CZMA at the lease sale stage will somehow benefit the states in derogation of the national interest. Indeed, they suggest that while there is a "national interest" in the "expedited development of vital resources on the outer continental shelf,"[70] there is only a "states' interest" in the

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[69]Petitioners cite a number of cases decided under statutes other than the CZMA — such as NEPA and the Endangered Species Act. Fed. Br. pp. 22, 28 n. 29; WOGA Br. pp. 34, 45. However, as the trial court explained, these statutes have a much narrower focus than the CZMA, which is intended to comprehensively manage the coastal zone for this and future generations. DOI Pet. at 77a. Ironically, however, one of the cases they cite demonstrates that the Endangered Species Act requires consultation *both* at the lease sale stage *and* at the subsequent stages. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980) (" 'The earlier in the progress of a project a conflict . . . is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.' ").

In any event, petitioners conveniently ignore the fact that consideration of the statute at issue here — the CZMA — has come out against them in the courts which have considered the issue. *Kean v. Watt, supra; California v. Watt, supra*, 17 E.R.C. 1711.

[70]In so stating, petitioners overlook the fact that while OCSLA is primarily concerned with development of the OCS, the statute also makes clear Congressional intent to protect the environment. 43 U.S.C. §§ 1802(b)(7), 1332(5); 1332(4); 1802(4), (5), (6).

preservation, and protection of the coastal zone. Fed. Br. p. 19.

Congress would be indeed surprised to hear this. The entire purpose of the CZMA was to protect the "national interest" in preserving the coastal zone, which is a *national* treasure. 16 U.S.C. § 1451(a); H.R. Rep. No. 92-1049, *supra* at 9.

In essence, DOI seeks to unilaterally elevate the national interest in OCS development over the national interest in coastal zone protection. However, only Congress can make such a choice. To date, Congress has made clear its desire to advance *both* national interests. This can only be done if § 307(c)(1) is applied to DOI's leasing activities.

Nor is this inconsistent with federal paramountcy on the OCS. It must be remembered that it is by virtue of the very federal authority championed by petitioners that Congress has applied a variety of statutes on the OCS — including the CZMA.[71]

The CZMA itself is a carefully crafted scheme which spells out the very federal and states' rights that are at issue in this case. Federal-state cooperative planning and coordination are at the heart of the Act. S. Rep. No. 94-277, *supra*, at 3; 16 U.S.C. § 1457(c). See Part I-A, *supra*. As a result of this statutory scheme, states with federally approved coastal zone management programs are given a greater role in OCS decisionmaking than states without such programs. See *e.g.*, 16 U.S.C. § 1456(c)(3)(B); Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59. However, the entire statutory scheme has built-in federal controls

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[71]In addition, WOGA argues that to apply the CZMA on the OCS would undermine federal rights established by virtue of the "1953 Compromise." WOGA Br. pp. 17-21. While this issue is more fully addressed in NRDC's Brief, the point is simply that the 1953 Compromise has nothing to do with this case. The states are not trying to re-argue ownership issues, and no one disputes that the federal government has paramount authority on the OCS. The only question here is whether DOI will be required to recognize certain limited rights that *Congress* has granted the states. If anything, it is petitioners' argument that undermines federal authority by suggesting that Congress cannot give the states any authority in an area of federal jurisdiction.

and safeguards that prevent any arbitrary exercise of the state's consistency rights.

Federal agencies exercise significant power over the content of coastal zone management programs. While states initially develop such programs, they have no effect under the CZMA unless they meet national criteria and are approved by the federal government. 16 U.S.C. §§ 1455(c), 1456(c)(1). The Secretary of Commerce may not give the required approval "unless the views of federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b). DOI is among the federal agencies consulted during this process, and specifically was involved in the approval of California's Coastal Zone Management Program. California Coastal Management Program, Attachment J at 20; Exh. L-18; C.R. 3.

Moreover, Congress gave special attention to energy production, both on the OCS and elsewhere. Unless the Secretary of Commerce finds that a state program provides for adequate consideration of the national interest in energy production, he must disapprove it. 16 U.S.C. § 1455.[72]

In addition to the controls imposed during the development of the program, it must be remembered that after the program is approved, it is the *program itself* with which the federal activities must be consistent. NOAA's regulations make clear that under 307(c)(1) (and 307(c)(2)), it is the *federal agency* that makes the consistency determination. 15 C.F.R. § 930.34.[73] NOAA's regulations then provide

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[72]Indeed, California's program has been specifically reviewed on the question of whether it satisfied this requirement, and the Ninth Circuit ruled that it did. *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1315 (9th Cir. 1979). Furthermore, the Court found that the California Program and the CZMA contained adequate safeguards to protect against any arbitrary exercise of the state's consistency powers. *Id.*

[73]This does not mean that the federal agency can simply ignore the views of the state. NOAA's regulations demonstrate that the federal agency is expected to reach its determination through a process of coordination with the state, and both governments are encouraged to work out their differences. 15 C.F.R. §§ 930.39-930.44. As a preliminary matter, federal agencies are strongly encouraged to obtain the views and assistance of the state agency in formulating the determination. 44 Fed. Reg. 37148 (1979) (comment to 15 C.F.R. § 930.39(a)). On matters where the interpretation of the state's program is at issue, the state, as the body that developed the program, would likely be given substantial deference.

that the state has a right to disagree with the federal agency's consistency determination, stating the reasons for its disagreement and describing alternative measures which, if adopted, would allow the activity to proceed consistent with the program. 15 C.F.R. § 930.41-42.

If there is disagreement, the regulations contemplate negotiation and cooperative efforts between the parties to resolve their differences, either on their own or through mediation by the Secretary of Commerce.[74] 15 C.F.R. § 930.43-44. If the disagreement cannot be resolved, the federal agency has the ability to proceed.[75]

All of this is to be contrasted the Congressional scheme under § 307(c)(3), when the consistency of private industry is at issue. Under this section, if the state objects because the activity is inconsistent with the program, the activity simply cannot go forward.[76] 16 U.S.C. § 1456(c)(3).

It is thus clear that when Congress chose to give states the authority to unilaterally stop activities, it said so. At the same time, however, under § 307(c)(1), the federally approved coastal zone management program becomes a *substantive requirement of federal law* to be complied with along with all other applicable federal requirements. See 15 C.F.R. § 930.32 and comments thereto, 44 Fed. Reg. 37146 (1979). This is not a "veto," since it is the *program* with which the federal activities must be consistent. Rather, this is the application of a *federal scheme* for the protection of

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[74]Indeed, the mediation provisions of the CZMA were expanded in 1976 precisely because Congress foresaw that these kinds of federal-state disagreements could occur. H.R. Rep. No. 94-1298, 2d Sess. 52 (1976).

[75]The fact that the statute does not automatically preclude the federal agency from going forward with the activity does not necessarily mean that the agency is in compliance with the CZMA. As with other federal agency actions in violation of federal statutes, the state can bring suit if the agency's action should be stopped because it is inconsistent with the coastal zone management program.

[76]"*No license or permit shall be granted* by the Federal agency until the state or its designated agency has concurred with the applicant's [consistency] certification. . . ." 16 U.S.C. § 1456(c)(3)(B) (emphasis added). The state's objection can be overridden by the Department of Commerce in certain circumstances. 16 U.S.C. § 1456(c)(3).

our *national* coastal zone.[77]

Nor does petitioners' repeated reliance on OCSLA help their cause. Even OCSLA makes clear that while states were not intended to have a "veto" over federal OCS activities pursuant to OCSLA, they were intended to be given a "leading role" in federal OCS decisionmaking, notwithstanding federal paramountcy on the OCS. H.R. Conf. Rep. No. 95-1474, *supra* at 106; H.R. Rep. No. 95-590, *supra* at 52-53. Indeed, one of the primary purposes of the 1978 Amendments was to limit the DOI's discretion under the OCSLA with a corresponding increase of state participation in OCS decisionmaking. H.R. Rep. No. 95-590, *supra* at 50, 104-06, 152, 153.[78] As a result, OCSLA now permits governors to make lease sale recommendations which must be accepted by DOI when certain criteria are met. 43 U.S.C. § 1345.

In short, petitioners' spectre of hypothetical state abuse of § 307(c)(1) consistency requirements is completely un-

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[77]As NOAA has stated, even after federal approval, the program must continue to be responsive to federal requirements or approval may be withdrawn. J.A. 60; see also 6 U.S.C. § 1458(d). Moreover, Congress retained the ability to review and remedy any possible state abuse through an annual review of activities found to be inconsistent with approved programs. 16 U.S.C. § 1462(a)(6). Indeed, Congress during its recent oversight proceedings did review the states' consistency record, and found that they had not abused their authority:

> "A concern was raised at the hearing that § 307 may be used by the states to override Federal authority in OCS leasing activities. This had not been borne out by the record to date. It may be useful to note that state coastal zone management plans are approved under § 306, and are the direct result of, and must continue to be responsive to, a set of Federally mandated goals set out in the Coastal Zone Management Act in order for Federal consistency to continue to be applicable at the state level." S. Rep. No. 96-783, *supra*.

[78]OCSLA also permits state law to fill in the gaps in federal OCS law. 43 U.S.C. § 1333(2)(A).

As explained above, pp. 33-35, the states' rights under OCSLA are in addition to those derived from the CZMA, and apply under different conditions. As NOAA concluded in 1979, Congress intended additional benefits for states which expended the significant effort necessary to develop coastal programs addressing national concerns: "States with approved programs are provided with *both* mandatory CZMA consistency authority and discretionary OCS Lands Act (§ 19) gubernatorial recommendations. . . ." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59.

founded. Their position in this case is nothing more than an attempt to exempt DOI's OCS activities from a federal statute which is applicable to all other federal agencies, and, indeed, even to all of DOI's other activities.[79] However, such an exemption would undermine the purpose and policies of the CZMA, and would flatly contradict Congressional intent to include DOI's pre-leasing and leasing activities within § 307(c)(1) requirements.

Nor would application of § 307(c)(1) unduly disrupt OCS activities. DOI is now preparing consistency determinations on all OCS lease sales throughout the United States with the sole exception of the tracts at issue in Lease Sale 53. NOAA has concluded that application of consistency requirements at the lease sale stage would actually reduce conflicts with affected states and avoid delay during the subsequent stages. 44 Fed. Reg. 37142 (1979). Indeed, to hold otherwise would undoubtedly *increase* litigation, because consistency issues would have to be resolved *one tract at a time* and one exploration or development/production plan at a time. See Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 60-61.

In sum, the states are not seeking to interfere with the paramount authority of the federal government on federal

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[79]As NOAA explained in 1979:

"Failure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities significantly affecting the coastal zone. The exemption is particularly unreasonable in light of the fact that other Interior public land management activities which significantly affect the coastal zone (e.g., *onshore oil and gas, geothermal and coal development*) are subject to the federal consistency requirements. Allowing this adverse precedent to be set would encourage other federal agencies to claim implied exemptions whenever "state consultation" procedures are incorporated in legislation enacted subsequent to the 1972 CZMA. Accordingly, *an exemption for Interior could be the first step towards serious erosion of the consistency provisions, and consequent intergovernment conflicts.*" Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 61 (emphasis added).

lands. Instead, we seek only the rights Congress has granted us in order to implement the national interest in preserving and protecting the coastal zone.

V.

LEASE SALE 53 "DIRECTLY AFFECTS THE COASTAL ZONE" OF CALIFORNIA WITHIN THE MEANING OF SECTION 307(c)(1).

The ultimate question in this case is whether, as the lower courts found, Lease Sale 53 "directly affects the coastal zone" within the meaning of § 307(c)(1). This of course turns entirely on the preceding discussion concerning the meaning of this threshold test and how Congress intended it to apply within the context of OCS leasing activities.

Congress clearly intended that § 307(c)(1) and its threshold test be interpreted broadly so that states would be provided with an incentive to develop and apply coastal management programs, and so that federal activities would not contribute to the degradation of the coastal zone. Only through the development and application of such programs would the goal of preserving our precious coastal zone resources be achieved. It was on this basis that Congress first suggested the "functional interrelationship test," as well as its alternative formulation that a federal activity directly affects the coastal zone when it initiates a series of events of coastal management consequence.

DOI and WOGA have argued for a restrictive definition of the threshold test which would effectively exclude DOI's OCS pre-lease and lease sale activities from § 307(c)(1), and for a blanket exemption of OCS pre-lease activities. However, as we have shown, the definition urged by DOI has no support in the legislative history of the CZMA and is not even supported by those authorities upon which DOI relies. Moreover, the legislative histories of both the CZMA and OCSLA, and the opinions of the Department of Justice and NOAA all demonstrate that OCS pre-lease and lease sale activities are not exempt from § 307(c)(1); DOI has previously conceded as much.

Thus, the definitions of "directly affecting the coastal zone" suggested by Congress, adopted by the lower courts,

and urged here by respondents must be employed to determine whether Lease Sale 53 "directly affects" the California coastal zone. Applying those definitions leaves little doubt that Lease Sale 53 initiates a series of events of coastal zone management consequence and has a "functional interrelationship" with the California coastal zone. DOI Pet. 12a-13a, 62a-65a.[80] As the Ninth Circuit ruled, Lease Sale 53 establishes the first link in a chain of events leading to oil and gas development. DOI Pet. at 13a. Application of consistency requirements to this lease sale is all the more important because the leasing of these tracts has enormous implications for the coatal zone development that accompanies OCS development: including resolution of such issues as the need for marine terminals and onshore processing facilities within the coastal zone.

The numerous "direct effects" of Lease Sale 53 were described at length by the District Court (DOI Pet. at 62a-65a) and will not be repeated here. It should be noted however that the "direct effects" are particularly significant on the facts of this case, where the OCS tracts at issue commence at the three-mile limit and are thus immediately adjacent to the very coastal zone resources Congress sought to protect by virtue of the CZMA.

Indeed, based on recent developments, DOI must concede as much. Lease Sale 73, which is scheduled for November 1983, is located off the Central California coast in the same area as the tracts at issue in this case. In fact, the Lease Sale 73 tracts being offered *surround* the Lease Sale 53 tracts at issue here. Because DOI has already prepared a

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[80]As previously discussed (p. 20, n. 34), even under petitioners' "intervening cause" test, it would be clear that Lease Sale 53 directly affects the coastal zone. As the District Court observed, DOI "reasonably anticipates" the coastal zone effects of OCS development when it issues the leases, and the federal approvals at subsequent stages cannot, by any stretch of the imagination, be found to "destroy the causal connection between the act [DOI's leasing] and the effect." DOI Pet. at 60a, n. 16

consistency determination for Lease Sale 73,[81] the agency has at last demonstrated beyond dispute what California has contended throughout this litigation: that is, if the correct definition of the "directly affecting" threshold test is applied, there can be no doubt that Lease Sale 53 requires a consistency determination.

CONCLUSION.

The Ninth Circuit judgment that Lease Sale 53 "directly affects" the coastal zone and requires a consistency determination should be upheld.

Respectfully submitted,

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[81] By letter of June 30, 1983, DOI transmitted to the California Coastal Commission a "Determination of Whether Outer Continental Shelf Lease 73 is Consistent to the Maximum Extent Practicable With the California Coastal Management Program." In this document, DOI analyzed whether the lease sale is consistent with some sixteen different policies of the California Coastal Zone Management Program. In its response, the state may indicate that additional policies are involved. WOGA's suggestion that consistency will turn on only one policy of the Program is a gross simplification. WOGA Br. p. 8.

It should also be noted that of the 29 tracts at issue here, 10 were not bid upon at Sale 53. (The District Court's injunction permitted bids to be received but not accepted.) DOI has included these 10 Lease Sale 53 tracts in its proposed Notice of Sale for Lease Sale 73 and has stated that it is considering leasing these tracts as part of Lease Sale 73. "Special Report by the Federal Defendants Concerning Status of These Cases," filed in *California v. Watt*, Nos. CV-81-2080, CV-81-2081 (C.D. Cal. July 26, 1983).

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BRIEF OF RESPONDENTS COUNTY OF HUMBOLDT, ET AL

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QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was based upon the purposes of the CZMA, Congress' understanding of the meaning of "directly affecting" and the statements of Congress in the legislative history of the Act that it intended this provision to apply to OCS leasing, and the interpretation by the federal agency charged with administering the Act.

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JAMES G. WATT, ET AL.,
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Respondents.

BRIEF OF RESPONDENTS COUNTY OF HUMBOLDT, ET AL.

STATEMENT OF THE CASE

The decisions of the courts below require that the Secretary of the Interior conduct an outer continental shelf ("OCS") oil and gas lease sale, designated as Lease Sale 53, "in a manner which is to the maximum extent practicable, consistent" with California's federally approved coastal management program, pursuant to Section 307 (c)(1) of the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1456(c)(1). Respondents Humboldt County *et al.* (hereinafter "Local Governments") support the affirmance of the decisions below because of their stake in the effectiveness of California's coastal management program in addressing the impacts of OCS leasing and development upon California's coastal zone.[1]

Respondents Local Governments are comprised of 24 cities, counties and regional agencies with jurisdiction over portions of the coastal zone in California. The CZMA contemplates that Local Governments will take an active role in the planning, implementation and decisionmaking with respect to activities and programs that affect their portions of the State's coastal zone. *See, e.g.*, 16 U.S.C. § 1452(2)(H)

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[1]These respondents accept as substantially accurate the statement of the case contained in the Brief for Petitioners Watt *et al.* ("DOI Br.") when supplemented by the statement contained in the Brief for the Cross-Petitioners and the additional matters set forth herein. For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ....." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ....a." References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, ("WOGA") are cited as "WOGA Br. at ....." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

(local government participation in decisionmaking); § 1454 (g) (allocation of funds to local governments); § 1455(c) (2)(B) (mechanisms for continuing participation of local governments in coastal management programs); and § 1456a(a)(1) (funding assistance for local governments under coastal energy impact program).

Under California's federally approved coastal management program, Local Governments have a major role in dealing with OCS development matters, such as the location of onshore support facilities, crude oil treatment and processing systems, oil and gas transportation alternatives, oil spill containment programs and other resource management concerns related to such energy development. *See American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 922-926 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979).

The impacts of OCS development are of particular concern to Local Governments because of the scale and pace of OCS development off the California coast. A total of 239 leases have been awarded in federal areas in proximity to the California coastal zone.[2] Offshore of Santa Barbara County alone, federal oil and gas leases have been granted on 68 tracts in the Santa Barbara Channel, 51 tracts north of Point Conception and on additional tracts south of the Channel Islands—in addition to the state oil and gas leases on 30 tidelands parcels. Onshore support facilities for OCS development currently include twelve separation and treatment facilities in Santa Barbara and Ventura Counties and ten marine terminals located in those two counties and in San Luis Obispo County.[3] Not only have five of the six Pacific OCS sales to date taken place off the California coast but the current federal Five

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[2] Minerals Management Service, Department of the Interior, *Pacific Summary Report* 28 (1982).

[3] *Pacific Summary Report*, *supra* note 2, at 56.

Year Leasing Plan shows one California lease sale per year for the period 1983-1986.[4]

The amount and location of current and proposed OCS development have created complex management issues that must be addressed by Local Governments as well as the State. The application of Section 307(c)(1) to the OCS lease sale stage, under the provisions of the CZMA, is, in the view of Local Governments, vital to their ability to manage, in cooperation with both the state and federal governments, the direct effects on the coastal zone of this accelerated OCS leasing.[5]

SUMMARY OF ARGUMENT

I. In passing the CZMA, Congress declared that there was a "national interest" in the effective management of the coastal zone. Through federally funded and approved coastal management programs, prepared by the states with the participation of federal agencies, it established the mechanism for balancing conflicts such as those between coastal zone protection and the development of energy resources on the OCS. Moreover, Congress recognized that these management programs would be ineffective in protecting the national interest in the coastal zone if they applied only to the actions of state and local governments, and it accordingly required in Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), that all federal activities "directly affecting" the coastal zone be conducted "to the maximum extent practicable, consistent" with federally approved coastal management programs. In this regard, the coastal impact of OCS development was one of Congress' principal concerns in enacting the CZMA, and the legislative history of the Act contains unequivocal statements of Congress' intent that Section 307(c)(1) apply to OCS leasing.

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[4] *Pacific Summary Report, supra* note 2, at 45.

[5] See discussion *infra* at 38-41.

Petitioners take a different view of the national interest. To them, the "national interest" lies singularly in "OCS resource development" (DOI Br. at 48), and they purport to find its confirmation not in the statute under review but in another statute, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331 *et seq.* Although they can point to no specific conflict between any particular directives in the two statutes—and, indeed, acknowledge that the Secretary of the Interior is currently complying with both (DOI Pet. at 19 n. 18)—they nevertheless argue that the lower courts' interpretation of Section 307(c)(1) will undermine the overriding commitment to OCS development which they discern in OCSLA and the procedures established therein for achieving this commitment. DOI Br. at 27-29; WOGA Br. at 21-31. They reach this conclusion by characterizing the application of consistency review to OCS leasing as a potential state "veto" of OCS development. DOI Br. at 26.

However, there is nothing in the text or legislative history of OCSLA or in any canon of statutory construction which suggests that OCSLA provides more definitive guidance for the interpretation of Section 307(c)(1) of the CZMA than does the CZMA itself or its legislative history. Petitioners' argument ignores the "national interest" in coastal zone management reflected in the CZMA, and misconceives the role of the coastal management program and consistency review in fulfilling that interest. Contrary to petitioners' assertions, the lower courts' interpretation of Section 307(c)(1) does not provide the states with any "veto" and does not detract from any paramount rights of the United States in the OCS. It requires only that the Secretary of the Interior comply "to the maximum extent practicable" with the body of law which Congress has determined should be applied to OCS leasing—the coastal management program.

II. The lower courts properly construed the phrase "directly affecting" in Section 307(c)(1) by employing the

tests for the application of this provision which Congress itself formulated in the legislative history of the Act. They properly determined that there was a "functional interrelationship" between OCS leasing and the administration of the coastal zone and that OCS leasing initiated "a series of events which have consequences in the coastal zone." DOI Pet. at 13a, 51a. In place of the language of Section 307(c)(1) and Congress' elaboration of its meaning, petitioners seek to substitute other definitions of their own making on the supposition that the phrase "directly affecting" has one and only one "plain meaning." There is, however, nothing in the lower courts' interpretation of that phrase which departs from any "plain meaning" that it has, and surely nothing which requires that such interpretation be made without regard to the legislative history or purpose of the provision in question, as petitioners contend. Their efforts to demean the significance of OCS leases contradict Congress' own understanding of those instruments as authorizations for OCS development.

III. Petitioners also argue that it is meaningless to render a consistency determination at the stage of OCS leasing because of a host of "uncertainties" and the impossibility of issuing a "guarantee" that all hypothetical future activities will be consistent with a state's coastal management program. What petitioners ignore is that there are vital determinations that can be made only at the lease sale stage. The selection or deletion of tracts for leasing and the establishment of stipulations as the terms of the lease "establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a. If the consistency review procedures as established by Section 307 of the CZMA are deferred to a later time when individual exploration or development plans are submitted on a tract-by-tract basis, the opportunity to apply the broader concerns of the coastal management

program will be foregone entirely. Moreover, the "federal activity" in the OCS process—the *leasing* of the OCS—will never be subjected to consistency review by the federal government. Finally, there is no requirement that the Secretary of the Interior issue impossible "guarantees" in the consistency review process, as applied to OCS leasing. Again, petitioners obscure the important decisions that are made at the lease sale stage and overstate the obligations imposed by consistency review, as the essential premises of their argument.

IV. Petitioners also invite this Court to discard the consistency review process because of their apprehensions that its application to OCS leasing will breed incessant litigation, thwart OCS development and jeopardize the federal-state cooperation in the development of management programs. Based on the experience so far, petitioners' apprehensions appear misplaced. The early application of consistency to OCS leasing will in many instances reduce rather than aggravate conflicts between the competing interests of coastal protection and OCS development. Otherwise, states will be relegated to an essentially defensive or reactive posture in reviewing exploration and development plans submitted individually. More importantly, Congress has decreed that consistency is the prescribed vehicle for ensuring that the national interest in the management of the coastal zone is secured, and the "policy considerations" which petitioners advance provide no basis for a judgment by this Court to the contrary.

ARGUMENT

I. PETITIONERS' ARGUMENTS FAIL TO TAKE INTO ACCOUNT THAT CALIFORNIA'S COASTAL MANAGEMENT PROGRAM IS A FEDERALLY FUNDED AND APPROVED VEHICLE FOR THE PROTECTION OF THE "NATIONAL INTEREST" IN THE COASTAL ZONE AND DOES NOT CONSTITUTE A "STATE VETO" OF FEDERAL ACTIVITIES.

The Solicitor General seeks to dramatize the issue in this case by implying that it pits "the national interest in OCS resource development" against "California's interest in the preservation of its coastal zone." DOI Br. at 48. He asserts, moreover, that the decisions of the lower courts have armed the states with a potent "veto" over OCS development (*id.* at 26), which may be used to defeat this "national interest." What these characterizations fundamentally ignore, however, is that California's coastal management program is not merely a "state law" (*id.* at 13) or a "state administrative process" (WOGA Br. at 3) but a federally funded and approved management program intended by Congress to serve as the vehicle for the protection of a clearly defined "national interest" in the coastal zone.

In passing the CZMA, Congress recognized that coastal management programs could not fulfill this important national objective if they applied only to the actions of state and local governments. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress required that the activities of federal agencies "directly affecting" the coastal zone, their development projects "in" the coastal zone, and certain licenses and permits issued by them, be "consistent" with a federally approved coastal management program.

The application of this consistency review to OCS leasing under Section 307(c)(1) does not, however, provide the states with a "veto" over OCS development, as petitioners assert, but rather requires the Secretary of the Interior to ensure that OCS leases are consistent, to the maximum

extent practicable, with the substantive body of law contained in the management program. Thus, petitioners' arguments are premised upon fundamental misconceptions of both the purpose and effect of the federal statute under review, the Coastal Zone Management Act.

A. Congress Has Determined that There is a "National Interest" in the Management of the Coastal Zone.

However narrowly petitioners conceive the "national interest," Congress determined, as the first premise for its enactment of the CZMA in 1972, that "[t]here is a *national interest* in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451 (a) (emphasis added). It further declared that it is "the *national policy* . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations," and to encourage federal, state and local governments to cooperate in developing and implementing coastal management programs for this purpose. 16 U.S.C. § 1452 (emphasis added).[6]

From the outset, Congress included development of the Outer Continental Shelf among the matters it expected to be addressed by coastal management under the CZMA. For example, Congress recognized that energy demands on the OCS "are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1451(f). It specifically included the "extraction of mineral resources and fossil fuels," among the developments which it found had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, per-

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[6] The legislative history of the 1972 Act contains pervasive evidence of the broad conception held by Congress of "the national interest" in protection of the coastal zone and its effective management through coastal management programs. *See, e.g.*, S. Rep. No. 753, 92d Cong., 2d Sess. 1-7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 9-11 (1972).

manent and adverse changes to ecological systems. . . ." 16 U.S.C. § 1451(c).[7]

In the 1976 Amendments to the CZMA, Congress underscored its original intent that coastal zone management provide the principal means for resolving the conflicts between the accelerated pace of OCS development and other energy facility siting, and the protection of the coastal zone. Thus, it amended the findings in Section 302 to add a reference to the "national objective of attaining a greater degree of energy self-sufficiency" (16 U.S.C. § 1451(j)); it included a specific reference to "energy facilities" as part of the "national interest" which must be given adequate consideration in coastal management programs (16 U.S.C. § 1455(c)(8)); and it required that coastal management programs include a planning process for "energy facilities likely to be located in, or *which may significantly affect, the coastal zone*" (16 U.S.C. § 1454(b)(8) (emphasis added)).[8]

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[7]Congress clearly did not intend that all future development thus affecting the coastal zone be forestalled but rather that it be effectively "managed" so that the national interest in both protection and development of the coastal zone could be achieved. In Congressional hearings preceding the Act's passage, Administration spokespersons, such as Dr. Robert White, the Administrator of the National Oceanic and Atmospheric Administration, emphasized the need for this management approach:

> "The coastal zone is a unique area. Rational management of activities therein is one of the more critical environmental problems facing our Nation. Much of the area is in a state of degradation and under severe competition for various types of economic development.
>
> We feel that the answer here is not to stop development but to provide for orderly and rational utilization of this region."

Coastal Zone Management: Hearings on H.R. 2492, 2493 and 9229 Before the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 273 (1971). ***See also*** S.Rep. No. 753, 92d Cong., 2d Sess. 6 (1972) ("The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the alternatives").

[8]"Energy facilities" were defined to include "oil and gas facilities, including platforms, assembly plants, storage depots, tank farms,

At the same time, Congress left intact its earlier finding that there was "national interest" in coastal protection. It further required that coastal management programs protect "coastal resources of *national significance*" (16 U.S.C. § 1455(i) (emphasis added)), which were defined to include "any coastal wetland, beach, dune, barrier island, reef, estuary or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value" (16 U.S.C. § 1453(2)).[9]

The gist of the 1976 Amendments was simply a reaffirmation of Congress' determination that the balancing of these competing demands upon the coastal zone be done through coastal management programs. The Conference Report on the 1976 Amendments confirms this approach:

> "The conferees believe . . . that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; *and . . . that the discretion of the Secretary of Commerce and other Federal officials should be correspondingly limited.*" Conference

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crew and supply bases, . . . refining complexes . . . facilities including deepwater ports, for the transfer of petroleum . . . [and] pipelines. . . ." 16 U.S.C. § 1453(6).

[9]Throughout its deliberation over the CZMA, Congress has recognized that the cumulative destruction from year to year of such "local" resources as a wetland, a beach or an estuary was resulting in the loss of "coastal resources of national significance." *See, e.g.*, H.R. Rep. No. 1012, 96th Cong., 2d Sess. 2 (1980) ("we have damaged or destroyed over forty percent of our wetlands, and we continue to do so at a rate of 300,000 acres per year"). It was the sum total of these losses of "local" resources that occasioned the passage of the CZMA in the first instance and that has been the central concern of Congress in amending and reauthorizing it. In this respect, petitioners fundamentally misconceive the "national interest" when they imply that it is only "*California's interest* in the preservation of its coastal zone" (DOI Br. at 48, emphasis added) which would be served by the application of its management program to Lease Sale 53.

Report, H.R. Rep. No. 1298, 94th Cong., 2d Sess. 24 (1976) (emphasis added).[10]

Finally, in 1980, when Congress reauthorized the CZMA for another 5 years, it stressed once again the fundamental national value of the coastal protection mechanisms established by the Act:

> "It is this rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act and it is the growing awareness that such balancing will be increasingly difficult in the years ahead that argues strenuously for the authorization of, and the improvements made to, the CZMA contained in H.R. 6979." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 33 (1980).

The sole vehicle for ensuring that this sort of "balancing" takes place in the formulation and proposal of federal activities directly affecting the coastal zone is the "consistency" review process established by Section 307(c)(1) of the CZMA.

B. The Requirement of Consistency with the Management Program is Crucial to the Implementation of This National Interest.

The linchpin of the cooperative scheme envisioned by Congress in the CZMA is the coastal management pro-

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[10] *See also* 121 Cong. Rec. 23,055 (1975) (statement of Senator Stevens), 23,081 (Senator Muskie), 23,082 (Senator Kennedy), 23,083 (Senator Pell). Senator Williams, for example, stated:

> "Proposals are being made for a deep-water port, oil drilling and floating nuclear powerplants off our shore, and the only protection our precious coastal resource has is the Coastal Zone Management Act of 1972. This act was created to assist the States in developing adequate controls to prevent damage to the adjacent land and to preserve the fragile ecological balance in coastal areas." *Id.* at 23,084.

The debate in the House was replete with statements by the Representatives to this same effect. *See, e.g.*, 122 Cong. Rec. 6,113 (1976) (statement of Rep. Mosher); 6,113-114 (Rep. Lent); 6,117 (Rep. Forsythe); 6,121 (Rep. Daniels); 6,122 (Rep. Drinan); *id.* (Rep. Ruppe).

gram.[11] Congress authorized federal funding for the development and administration of the programs, and required that they be submitted for federal approval by the Secretary of Commerce under detailed criteria set forth in the Act.[12] The Act also requires that federal agencies participate extensively in the development of the management programs, and that state agencies adequately consider the views of federal agencies in program development.[13]

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[11]A "management program" was defined by Congress to include "a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. § 1453(12).

[12]Congress has authorized federal grants covering eighty percent of the costs of developing management programs, for each coastal state which demonstrates that the funds will be used to develop a management program consistent with particular criteria set forth in the Act. 16 U.S.C. § 1454. The Act in turn contains detailed requirements which relate to both the process for development of the program and its content. 16 U.S.C. § 1454. Programs which are federally approved qualify for federal funding of eighty percent of their administration costs. 16 U.S.C. § 1455. It should be noted that the Secretary of Commerce has delegated his responsibility under the CZMA to the National Oceanic and Atmospheric Administration ("NOAA").

[13]Congress has specifically declared it national policy "to encourage the participation and cooperation of . . . Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter." 16 U.S.C. § 1452. Thus, federal funds could not be made available for either development or administration of the program—nor could NOAA approve a program—unless it had been developed and adopted "with the opportunity of full participation by relevant federal agencies," among others. 16 U.S.C. § 1455(c)(1); *see also* 16 U.S.C. § 1456(b) (prohibiting the approval of a management program "unless the views of Federal agencies principally affected by such program have been adequately considered"). Any "serious disagreement between any federal agency and a coastal state in the development . . . of a management program" is required to be resolved by mediation. 16 U.S.C. § 1456(h).

Congress would not have required this participation by federal agencies in the development of a management program unless it expected that their activities would in fact be affected by that program. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress provided that various activities, development projects, permits and licenses under the jurisdiction of federal agencies be "consistent" with approved coastal management programs. Correspondingly, Congress has recognized that the requirement of consistency represents the "single greatest incentive for State participation in the coastal zone management program." S.Rep. No. 277, 94th Cong., 1st Sess. 9 (1975). As the Ninth Circuit observed, "[a] *quid pro quo* for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan." DOI Pet. at 14a.

It would be anomalous indeed if the federal activity which has the most significant impact upon the coastal zone—oil and gas leasing on the OCS—were not subject to this requirement of consistency. In fact, the legislative history of the subsequent amendments and reauthorization of the Act in 1976 and 1980 reflects Congress' understanding that consistency review of OCS leasing is required under Section 307(c)(1) of the CZMA.[14] Thus, in the present case, the erroneous determination by the Secretary of the Interior that Lease Sale 53 does not directly affect the coastal zone and his consequent refusal to make the consistency determination required by the CZMA, means

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[14]S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975) (the lack of coordination between coastal states and federal agencies prior to OCS leases could be resolved by "[f]ull implementation of the Coastal Zone Management Act of 1972"); *id.* at 37; S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("[t]he Department of Interior's activities which preceded lease sales were to remain subject to the requirements of Section 307(c)(1)"); H.R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (referring to "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases"). *See* also note 49 *infra*.

that an entire body of law that Congress intended be applicable to such federal activities—namely, the coastal management program—has never even been considered or applied by the Secretary.[15]

C. California's Management Program Was Reviewed and Commented Upon by Affected Federal Agencies, Approved by NOAA and Upheld in the Courts as Meeting The Criteria of the CZMA.

Although Congress intended that management programs meeting the criteria in the CZMA would apply to federal activities directly affecting the coastal zone, petitioner WOGA advances certain "policy considerations" for dispensing with their application to OCS leasing. WOGA Br. at 44. WOGA decries "the vague and general policies set forth in state CZMA programs" (*id.* at 45), it purports to critique California's management program

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[15]In all of the respects enumerated above, the consistency review process provided by the CZMA is fundamentally different in purpose and effect from procedures under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* Section 19(a) of OCSLA, 43 U.S.C. § 1345(a)—so heavily relied upon by petitioners—clearly provides states with an opportunity to participate in policy and planning decisions relating to management of the resources of the OCS, by permitting governors to submit "recommendations" to the Secretary regarding the "size, timing, or location" of OCS lease sales. *See* WOGA Br. at 24-25. However, in contrast to the requirements of the CZMA, OCSLA does not require that these recommendations be based on any coastal planning process, does not provide any federal funds for the development of these recommendations and does not require that they consider the views of federal agencies. Moreover, under OCSLA, these recommendations may be entirely *ad hoc*, directed to a single federal activity, and they need not be accepted by the Secretary of the Interior unless they take proper account, in his view, of a reasonable balance between the national interest and the state's interest. 43 U.S.C. § 1345(c). Finally, these "recommendations" can be made by any affected state. In contrast, the "consistency" review process under the CZMA is applicable only to states with federally approved management programs.

(*id.* at 6-10), and it invites this court to "extract" OCS leasing from this "morass" (*id.* at 45). However, these same arguments have already been rejected by NOAA and the federal courts in reviewing WOGA's prior challenge to federal approval of the California management program, and the only forum appropriate for further consideration of these "policy considerations" is Congress, not this Court.

In November 1977, the Secretary of Commerce approved the California Coastal Management Program. In so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered. Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> "The management program provides for 'adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.'" *Id.* at 18 (quoting 16 U.S.C. § 1455(c)(8)).

WOGA and the American Petroleum Institute sued to block approval of the California management program. *American Petroleum Institute v. Knecht,* 465 F.Supp. 889 (C.D. Cal. 1978), *aff'd,* 609 F.2d 1306 (9th Cir. 1979). Their suit was brought out of a purported concern that OCS development would be thwarted by the requirement of consistency with the state's management program. 456 F.Supp. at 922. They asserted that the management program had failed to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities, and that it was overly general. 456 F.Supp. at 920-922, 926. However, the District Court and the Ninth Circuit both rejected these claims, and all others that the plaintiffs advanced, and they found that the program did provide for adequate consideration of federal agencies' views and

the national interest. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.[16]

Moreover, to suggest, as petitioners do, that this Court may determine under the guise of statutory construction that it is not feasible to apply a coastal management program to a federal activity like OCS leasing would require this Court to substitute its judgment for that of Congress in enacting Section 307(c)(1) of the CZMA.[17] They also ignore the fact that the CZMA, as applied by the lower courts, typifies the approach Congress has taken in recent times in addressing national environmental or resource problems. In a number of contexts Congress has sought to serve national objectives or interests through the encouragement and funding of plans developed by states, in cooperation with federal authorities and under federal criteria, that deal with particular environmental or resource problems.[18] Indeed, in any number of instances

[16]WOGA argues that this decision was the product of "a restrictive standard of judicial review" (WOGA Br. at 6), and liberally quotes certain wry political observations made by the District Court concerning the CZMA in *American Petroleum Institute v. Knecht* (*id.* at 6-7, 45). However, the fact remains that the District Court painstakingly reviewed the California management program in a 43 page opinion and determined that it "takes an approach which has received the congressional blessing." 456 F.Supp. at 926. Moreover, with respect to WOGA's arguments that the program was too general, the District Court pointedly stated that "[t]o the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a 'zoning map' which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their position." *Id.*

[17]*See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1978).

[18]*See, e.g.*, Clean Air Act, § 110, 42 U.S.C. § 7410 (Supp. V 1981) (providing for state implementation plans for national primary and secondary air quality standards); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926 (1976 & Supp. V 1981) (authorizing state programs to regulate the treatment, storage, transportation and disposal of hazardous waste, a problem Congress found to be national in scope); Safe Drinking Water Act § 1413, 42

Congress has required that federal facilities or land—like federal leasing of the Outer Continental Shelf—be subject to the requirements of state plans developed to serve these kinds of objectives.[19] The application of coastal management programs to OCS leasing thus serves the "national interest" by a means which Congress has deemed feasible in the CZMA and in numerous other enactments.

D. Petitioners Mischaracterize the Effect of the Consistency Review Process as Applied to OCS Leasing in the Decisions of the Lower Courts.

While according little attention to Congress' concern for the "national interest" in the coastal zone reflected in the CZMA, petitioners on the other hand greatly exaggerate the impact of the application of coastal management programs to OCS leasing. For example, the Solicitor General argues that the lower courts' construction of Section 307(c)(1) "gives California a potential veto over a broad range of federal activities on the OCS not previously considered to be within the reach of state control."

U.S.C. § 300g-2 (1976) (authorizing state programs to enforce national drinking water regulations); Surface Mining Control and Reclamation Act § 503, 30 U.S.C. § 1253 (Supp. V 1981) (allowing for state program of enforcement of national standards for surface coal mining and reclamation); Federal Water Pollution Control Act § 402, 33 U.S.C. § 1342(b) (Supp. V 1981) (allowing states to establish their own permit programs to regulate discharges in order to effect federal effluent limitations).

[19] All of the federal legislation cited in the preceding footnote provides that federal facilities and activities will be subject to state control. *See, e.g.*, Clean Air Act § 118, 42 U.S.C. § 7418 (Supp. V 1981); Resource Conservation and Recovery Act § 6001, 42 U.S.C. § 6961 (1976 & Supp. V 1981); Safe Drinking Water Act § 1447, 42 U.S.C. § 300j-6(a) (Supp. V 1981); Surface Mining Control and Reclamation Act § 523, 30 U.S.C. § 1273 (providing that the requirements of an approved state program must be incorporated in any federal mineral lease for surface coal mining as well as allowing state regulation of surface coal mining on federal lands); Federal Water Pollution Control Act § 313, 33 U.S.C. § 1323 (Supp. V 1981). In *Hancock* v. *Train*, 426 U.S. 167 (1976) and *EPA* v. *California ex rel State Water Resources Control Board*, 426 U.S. 200 (1976), this

DOI Br. at 26. However, the Ninth Circuit took pains in its opinion to dispel any notion that its holding implied that states possessed a "conclusive" or "final veto power" over OCS oil and gas development. DOI Pet at 20a-21a. Indeed, respondents, plaintiffs below, did not argue—and do not argue now—that Section 307(c)(1) grants states any unilateral authority to "veto" particular lease sales—much less any "conclusive" or "final" veto authority.[20]

While the activities of the Secretary of the Interior which directly affect the coastal zone of a state must be consistent "to the maximum extent practicable" with the state's management program, it is the Secretary and not the state who makes that determination of consistency. In that sense, Congress has decreed that once a state's management program has been approved by NOAA as satisfying the criteria of the CZMA, that management program becomes the body of substantive law which thereafter

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Court held that the substantive provisions of state plans developed under the Clean Air Act and Federal Water Pollution Control Act respectively, were applicable to federal facilities, but that state permit requirements were not applicable. Following these two decisions, Congress amended both laws to make clear that state permit requirements also applied to federal facilities. *See* Conference Report, H.R. Rep. No. 506, 95th Cong., 1st Sess. 12 (1977); Conference Report, H.R. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977).

[20]If the Ninth Circuit had confined its opinion to this clarification, respondents would have no quarrel with it. However, the Ninth Circuit not only concluded that the final determination of consistency under § 307(c)(1) rests with the Secretary of the Interior, but also impliedly suggested that the Secretary has discretion to avoid consistency with the state's management program on the basis that OCS activity "would be hampered or proscribed by conformity" with it or apparently on the basis of his views of the "the reasonableness of the state plan." DOI Pet. at 22a. But the fact that it is the Secretary who determines consistency does not mean that he has this kind of broad discretion to act "inconsistently" with the state plan. Respondents submit that the Ninth Circuit's reading of the "maximum extent practicable" language may render the requirement of "consistency" largely nugatory and is entirely unwarranted. We have argued in the Brief in Support of the Cross-Petition that this portion of the Ninth Circuit's opinion was unripe for decision.

confines the Secretary's discretion in OCS leasing—but it has not provided the states in Section 307(c)(1) with anything akin to a "veto." Such a veto would exist only if Congress had provided the states in Section 307(c)(1) with final authority to determine the consistency of the federal activity. Instead, Congress chose to repose the authority to make this determination in the federal agency conducting the activity.[21]

On the other hand respondents submit that the federal agency making this consistency determination is not entitled to disregard the state's views on whether the federal activity is consistent. Presumably the federal agency must accord substantial deference to the interpretation of that

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[21]In contrast, under § 307(c)(3), 16 U.S.C. § 1456(c)(3), which applies to federal permits or licenses, it is the state—not the federal permitting agency—which determines consistency, and a state's determination of inconsistency expressly bars the federal agency from issuing the permit. Congress decided that it would not give a state a "final veto" even in § 307(c)(3), however, but would provide for a federal override of a state's management program, as applied to federal permits or licenses, whenever the Secretary of Commerce determines that such an override would be consistent with the purposes of the CZMA, or in the interests of national security. 16 U.S.C. § 1456(c)(3)(A). It is noteworthy that Congress did not vest that override in the federal permitting agency but in the Secretary of Commerce, as an independent federal agency charged with overall implementation of the CZMA.

It is also significant that Congress originally considered proposals for a federal override of a state's management program under Section 307(c)(1). S.Rep. No. 753, 92d Cong., 2d Sess. 54 (1972). However, it ultimately rejected inclusion of any such override in Section 307(c)(1). *See* Conference Report, H.R. Rep. No. 1544, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972). Apparently, Congress concluded that the balance of federal-state relationships was properly struck there by vesting the *determination* of consistency with the federal agency and not the state, and providing that consistency must be preserved "to the maximum extent practicable." With this protection in place against any possibility of a *state's* abuse of the consistency provision, Congress did not believe it was appropriate to allow the federal agency to "override" the state's management program.

management program by the state agency responsible for its formulation and implementation.[22] Again, however, the states have not been granted any veto.

E. Given the "National Interest" which Congress Sought to Protect Through Coastal Management Programs, it is Clear that Section 307(c)(1) Does Not Detract From Any "Paramount Rights" that the United States Has in the OCS.

The upshot of petitioners' disenchantment with the coastal management scheme established by the CZMA is their request that its application to OCS leasing and development be determined largely by reference to another statute, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* *See, e.g.*, DOI Br. at 27-35; WOGA Br. at 21-32. They assert that any other approach risks subversion of Congress' intent in OCSLA to preserve the federal government's "paramount rights" over the OCS. DOI Br. at 26; WOGA Br. at 18-19. However, petitioners cannot identify any *conflict* between any particular directives in the two statutes. Moreover, their argument again fails to take into account the national interest that Congress sought to protect in the coastal zone and the nature of the system of federal-state coordination that Congress established in the CZMA to serve that interest. When the CZMA is properly understood, nothing in it or in the lower courts' interpretation of it detracts from the federal government's "paramount rights" in the OCS.

WOGA's argument is particularly far removed from any inquiry into the purposes of the CZMA. Rather, it proceeds from the assumption that the principal question before the Court is whether the application of consistency review at the OCS leasing stage would "undermine" the

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[22] Indeed, the regulations promulgated by NOAA contemplate a substantial interplay between the federal and state agencies, in resolving any disputes over whether particular federal activities are consistent. *See* 15 C.F.R. §§ 930.41, .42, comments; 44 Fed. Reg. 37149 (1979).

compromise reached in 1953 over ownership of the tidelands as between the state and federal governments. WOGA Br. at 17. Accordingly, it asks this Court to treat as automatically suspect any interpretation of the CZMA which would "give the states any measure of authority over OCS leasing." *Id.* at 18. However, as WOGA acknowledges, the 1953 Compromise to which it refers, dealt with the question of federal versus state *ownership* of the OCS. *Id.* at 17, 18.

Congress did not purport in that context to limit its own prerogative to take further action to ensure that development of the OCS would be conducted in harmony with other national concerns. That Congress thereafter determined that protection of the coastal zone was in the national interest and chose a vehicle for effective management of the coastal zone—fedrally funded and approved management programs that require federal determinations of consistency—in no way detracts from the United States' "paramount rights" in the OCS.

Respondents submit, moreover, that the fundamental question of statutory interpretation of the CZMA posed in this case must be answered principally by reference to the objectives which Congress sought to achieve by *that legislation.* Petitioners' suggestion that OCSLA, which deals only with development of the OCS, "should be given initial scrutiny" (WOGA Br. at 21) in interpreting the language of Section 307(c)(1) of the CZMA, which applies generally to all federal agencies, is clearly misplaced. In *Chemical Manufacturers' Ass'n v. Environmental Protection Agency,* 673 F.2d 507, 512 (D.C. Cir. 1982), the court rejected a similar argument that one federal statute should "be given precedence over" another. As the court stated:

> "When forced to choose which of two contradictory statutes to enforce, courts may decide that the more specific statute is an exception to the more general one. But if the statutes do not contradict one another

> no choice need be made. . . . [R]egulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts." 673 F.2d at 512.

See also Morton v. Mancari, 417 U.S. 535, 551 (1974). The court in *Chemical Manufacturers' Ass'n* also emphasized that the two statutes were intended to serve different objectives. 673 F.2d at 512.

In the present case, petitioners can point to no instance where compliance with both OCSLA and Section 307(c)(1) of the CZMA leads to "mutually exclusive results,"[23] and as discussed *infra* at 41-42, the two statutes are designed to foster different national objectives. When the statutory language of the CZMA at issue herein is examined in light of that statute's objectives, it is clear, as the lower courts discerned, that OCS leasing is subject to the consistency review requirement of Section 307(c)(1).[24]

II. THE LOWER COURTS PROPERLY CONSTRUED THE PHRASE "DIRECTLY AFFECTING" IN SECTION 307(c)(1).

The lower courts determined that Lease Sale 53 was a federal activity "directly affecting" the California coastal zone and that Interior was accordingly required to determine the consistency of Lease Sale 53 with the Cali-

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[23]That there is no such conflict between the two statutes is perhaps most evident from the fact that the Secretary of the Interior has been making consistency determinations under Section 307(c)(1) on all OCS leasing subsequent to the Ninth Circuit's decision herein. *See* DOI Pet. at 19 n. 18.

[24]Moreover, since the lower courts' interpretation of Section 307(c)(1) does not in any way detract from the United States' "paramount rights" in the OCS, it cannot be said to *overturn* the kind of "consistent, established rule" for which this Court has required a "clear statement" from Congress. *Ruckelshaus v. Sierra Club*, 51 U.S.L.W. 5132 (July 1, 1983). In any event, as discussed *supra* at note 14, Congress has clearly stated its intent that Section 307(c)(1) apply to OCS leasing.

fornia coastal management program. Their construction of this broad phrase, "directly affecting," does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; and it was recently reaffirmed by congressional statements on the subject.[25] Moreover, that construction is the only way in which the purposes of the CZMA can be achieved with respect to the important federal activity of OCS leasing.

It is surely no departure from any "plain meaning" of Section 307(c)(1) to say that the "direct effects" of a lease are the intended uses of the property leased—in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as "the first link in a chain of events" which thereafter includes the approval of exploration and development plans, the oil and gas development, and the consequent impacts upon a state's coastal zone. DOI Pet. at 13a.

Petitioners do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. However, petitioners suggest that an OCS lease is of little or no significance in determining the impact on a state's coastal zone because intermediate federal approvals are required for exploration and development. Thus, the Solicitor General asserts that "a lease does not directly authorize the lessee to explore for, develop or produce oil or gas." DOI Br. at 29. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . *authorizes exploration for, and development and production of, minerals.*" 43 U.S.C. § 1331(c)(emphasis added).

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[25] In addition to the decisions under review, every other court which has construed this language so far has also reached the same conclusion. *See Conservation Law Foundation v. Watt*, 560 F.Supp. 561 (D. Mass. 1983); *Kean v. Watt*, 18 ERC 1921 (D.N.J. 1982); *California v. Watt*, 17 ERC 1711 (C.D. Cal. 1982).

If no OCS lease is issued, then there will be no oil and gas development and no effects upon a state's coastal zone. If one is issued, its *intended effect* is to produce oil and gas development, which necessarily has coastal impacts[26] Moreover, as the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.[27]

Petitioners, however, seek to avoid the statutory language "directly affecting" by substituting a variety of phrases for it. For example, they assert that it reaches "only those federal activities that have a clear, immediate and identifiable impact on the coastal zone." DOI Br. at 25.[28] Elsewhere they assert that "direct effects" are those

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[26]The District Court found "ample evidence within the administrative record" that Lease Sale 53 "directly affects the coastal zone." DOI Pet. at 62a-63a. Among the direct effects detailed by the District Court in the area of the tracts challenged by respondents were the oil spills estimated to occur by the United States Geological Survey; the "unavoidable effects . . . on the quality of the surrounding water" from "[n]ormal offshore operations" like pipelaying, drilling, construction of platforms, chronic spills from platforms, and the discharge of treated sewage; the impacts on fish and invertebrate populations from drilling muds and cuttings; the displacement of recreational areas by OCS-related onshore facilities; the disruption of artifacts of historic interest and aboriginal archeological sites known to exist in the area; and "the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale." DOI Pet. at 63a-65a.

[27]As discussed *infra* at 31-34, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 34, 39-40.

[28]Similarly, petitioner WOGA appears to argue that an OCS lease would have such "direct effects" only if there were either a "physical activity" which DOI would conduct at the leasing stage

which occur "proximately" or "without any intervening agency, instrumentality or influence." *Id.* at 21-22; WOGA Br. at 36.[29] However, these are distinctly different formulations than "[t]he plain language of Section 307(c)(1)" (DOI Br. at 25), and are entirely of petitioners' own making.

On the other hand, petitioners devote little or no attention to the definitions which Congress itself has supplied, in the legislative history of the provision at issue. For example, the 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to Section 307(c)(1):

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or activities which OCS lessees would conduct "immediately after obtaining leases." WOGA Br. at 12. Surely, however, the fact that a lease is a piece of paper rather than a "physical activity" is not dispositive of the question, so long as there is a sufficient nexus between the lease and the effects on the coastal zone produced by the intended uses of the property leased. *See Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (rejecting the argument that environmental effects resulted from the lessee's operations and not from the approval of the lease by a federal agency). Nor are these effects any less "direct" because they do not occur "immediately." The fact that OCS development may occur years after the lease rather than the next day does not *ispo facto* make the effects of an OCS lease any less "direct." In this latter respect, the NEPA regulations, relied upon by petitioners (DOI Br. at 22 n. 19, WOGA Br. at 36), which define "direct effects" as those which "occur at the same time and place" as the action, are inapposite. Moreover, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time reject the definition adopted by NOAA, the one agency designated by Congress with that responsibility.

[29]As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* intergovernmental coordination in the management of coastal resources. DOI Pet. at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

> "[I]t is intended that any lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have *a functional interrelationship* from an economic, social, or geographic standpoint with land and waters within the coastal and estuarine zone, should be administered consistent with approved state management programs."

S. Rep. No. 526, 92d Cong., 1st Sess. 30 (1971)(emphasis added).[30] In 1980, when Congress reauthorized the CZMA, Pub. L. 96-464, 94 Stat. 2060 (1980), the House Report restated the 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

> "Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernmental coordination provisions of the Federal consistency requirements should apply."

H.R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980); *see also* S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus expressed its own understanding of the meaning of "directly affecting." The consistency re-

[30] As petitioners note, early versions of Section 307(c)(1) applied only to federal activities "in" the coastal zone. DOI Br. at 23. In 1972, the Conference Committee substituted the "directly affecting" language now found in the Act. *Id.* Petitioners assert that Congress intended, nevertheless, to retain the original limitation of Section 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of Section 307(c)(1). *Id.* at 24. Petitioners do not purport to rely on any "explicit legislative history" to support their inference, but merely assert that "it is evident." *Id.* at 23, 24. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the legislative history of the Act reflects Congress' specific intent that the federal activities covered by Section 307(c)(1) include ". . . activities *in or out of the coastal zone* which affect that area." S.Rep. No. 277, 94th Cong., 1st Sess. 37 (1975) (emphasis added).

quirement of Section 307(c)(1) applies whenever the administration of areas under federal jurisdiction and adjacent to the coastal zone, like the OCS, has a "functional interrelationship" with the coastal zone, or whenever a federal agency "initiates a series of events of coastal management consequences," as with OCS leasing. As NOAA has noted, these two tests are interchangeable, and, indeed, were carried forward by NOAA in the regulations promulgated by it under the CZMA, defining "directly affecting." *See* 44 Fed. Reg. 37143 (1979). In those final regulations NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to DOI's OCS pre-lease sale activities directly affecting the coastal zone." *Id.* at 37142.[31]

The lower courts did no more than give effect to these Congressional tests. As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." DOI Pet. at 13a.[32] Accordingly, it held that Lease Sale 53 was subject to the consistency requirements of Section 307(c)(1).

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[31]That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. After congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it. *See* 46 Fed. Reg. 50976-77 (1981); *see also* DOI Pet. at 17a-18a, 57a-58a.

[32]Similarly, the District Court held:

> "Clearly, *the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone.* Any other interpretation would thwart the purpose of the Act." DOI Pet. at 51a (emphasis added).

In *E.E.O.C. v. Wyoming*, 103 S.Ct. 1054, 1062 (1983), relied upon by petitioner WOGA (Br. at 35 n. 27), this Court stated that "a virtual chain reaction of substantial and almost certainly unintended consequential effects" might flow from the application of federal wage and hour laws to the states, as an explanation for its decision in *National League of Cities v. Usery*, 426 U.S. 833,

Petitioners prefer to accord no weight to Congress' own effort to define "directly affecting,"[33] in light of what petitioners conceive to be the "plain meaning" of "directly." DOI Br. at 20-21; WOGA Br. at 21, 35-36. However, when such legislative history is available as an "aid to construction of the meaning of words as used in the statute . . . there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination" to petitioners. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

Moreover, petitioners seek to obscure the purposes of the CZMA, as discussed *supra* at 7-14, despite this Court's observation in *Bowsher v. Merck & Co.*, 103 S.Ct. 1587, 1592 n.7 (1983), that the word "directly" in the statute there reviewed "does not dictate an answer" and that it is necessary to "analyze the policies underlying the statutory provision to determine its proper scope." As discussed next, the courts below did just that in arriving at their interpretation of Section 307(c)(1).

III. THE APPLICATION OF CONSISTENCY REVIEW TO LEASE SALE 53 IS NOT ONLY FEASIBLE BUT ESSENTIAL TO THE ACHIEVEMENT OF THE PURPOSES OF THE CZMA.

The thrust of petitioners' argument has a familiar refrain: that their compliance with the consistency review procedures in Section 307(c) should be deferred until a time when there is "optimal" information available or when "certainty" can be achieved in making these consistency

852 (1975), that such laws operated to "*directly* displace the States' freedom to structure integral operations." (emphasis added). Thus, this Court has recognized, as the Ninth Circuit recognized below, that effects resulting from a chain of events are nonetheless "direct" effects.

[33]In particular, they argue that the 1980 legislative history is entitled to no weight. DOI Br. at 40, 41; WOGA Br. at 42, 43. However, petitioners have ignored the fact that the "functional interrelationship" test is drawn from the legislative history of

determinations. *See, e.g.*, DOI Br. at 18, 43.[34] In fact, as demonstrated below, it is only at the lease sale stage that tract selection and deletion and the promulgation of lease sale stipulations can be dovetailed with the coastal management program. Those determinations can be made on the basis of the information then available. To defer consistency review until "optimal" information is supposedly available will lead to later piecemeal review, and will, indeed, allow the federal government to escape any consistency review of its own actions. As the courts below determined, this "wait and see" attitude would seriously defeat the purpose of the CZMA that there be early application of the management program's strictures to activities which will have an important impact upon the coastal zone.

Congress' deliberations in originally enacting the CZMA in 1972. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a-16a, 50a-51a; *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980) and the cases cited therein.

[34]In a host of cases, the courts have rejected agency arguments that performance of their statutory responsibilities should await the day when more information is available and greater certainty could be secured. As the court stated in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976):

> "Awaiting certainty will often allow reactive, not preventive regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventive albeit uncertain decisions legitimately be so labeled?"

Similarly, in *Illinois v. Gorsuch*, 530 F.Supp. 340, 341 (D.D.C. 1981), the court refused to countenance a further delay in promulgating regulations under a statute because "Congress did not direct the Agency to resolve every conceivable problem before issuing regulations." Finally, in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973), the court refused to accept the agency's argument that the project was of a "remote and speculative nature" and "remains uncrystalized in form and undetermined in application," as a basis for deferring compliance with NEPA.

A. Certain Vital Determinations of Consistency Can Be Made Only at the Lease Sale Stage.

The Solicitor General asserts that the deferral of consistency review to the time when the lessee submits exploration and development plans under Section 307(c)(3)(B) fully satisfies the purposes of the CZMA and renders it unnecessary to apply Section 307(c)(1) to the precedent issuance of OCS leases. *See* DOI Br. at 47-48. The answer to this argument was supplied *by the Department of Justice* in rejecting identical arguments made by the Department of the Interior only four years ago:

> "Paragraph (B) [of Section 307(c)(3)] is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or production plan. Under § 307(c)(3)(B) there will be a single consistency review following the submission of the plan by the lessee, and that review will cover any future activities described in detail in the plan. Section 307(c)(3)(B) thus simplifies the regulatory process during the post-leasing period. *It has no bearing on the consistency requirements antedating that stage of the leasing process. It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late. It is our opinion that with respect to pre-leasing activities § 307(c)(1) and § 307(c)(3)(B) can both be given effect. . . .*"[35]

Because Lease Sale 53 defined the physical and operational parameters for all of the subsequent exploration and

[35]Letter, April 20, 1979, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of the Interior, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Cal. Exh. L-15, J. A. at 43 (emphasis added).

development, it will certainly "give rise to consistency problems which cannot be reviewed at all" under Section 307(c)(3)(B) "or for which such review comes too late."[36] Fundamentally, the lease sale creates a *subdivision* of the OCS. It establishes those tracts where development may occur, specifies through lease stipulations the conditions for such development, and excludes other areas from development altogether.[37] As the Ninth Circuit held below:

> ". . . decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction." DOI Pet. at 13a.[38]

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[36]A decision of the Department of the Interior to offer thousands of acres of the OCS for development "is regarded as among the most significant Federal actions affecting the Coastal Zones." Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., *Outer Continental Shelf Oil and Gas Development and the Coastal Zone* 79 (Comm. Print 1974).

[37]In this respect it is analogous to the subdivision of land by local governments. Just as Interior retains the right to approve exploration and development on the subdivided tracts, so local governments retain the authority to approve or deny building permits for homes on lots created pursuant to a subdivision of land. Nevertheless, a local government's approval of the subdivision itself is considered to be the major land use decision because it determines which areas will be made available for development and which areas will require support services. Moreover, just as Interior sets stipulations in its lease sale, local governments also typically attach conditions to their approval of a subdivision map that determine the primary conditions under which development will be allowed to proceed, if at all. *See generally* J. Rose, *Legal Foundations of Land Use Planning* 315-54 (1979).

[38]Indeed, outside this litigation, the Department of Interior has characterized the effect of an OCS lease in the same manner:

One significant decision made in offering an OCS area for leasing is the selection or deletion of particular tracts. Thus, tracts under consideration for leasing may lie in proximity to what Congress identified in the CZMA as a "coastal resource of national significance," such as a "coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat." 16 U.S.C. § 1453(2). To the extent these areas of national significance have been identified in a coastal management program pursuant to Congress' mandate, and provisions to protect these resources have been established therein, leasing for oil or gas development anywhere in their vicinity may be undesirable—regardless of its precise ultimate location.[39]

". . . the leasing of OCS land sets in motion a process which can affect interests at all levels, and many decisions are made in that process which, in part, determine the manner in which any subsequent development may take place." Department of Interior, Bureau of Land Management, *Intergovernmental Planning Program for OCS Oil and Gas Leasing, Transportation and Related Facilities* 4 (1979). As Interior has further stated:

> "The tentative scheduling of an area for OCS leasing is a *major decision* in that it *establishes* the resource use conflict by identifying the potential new use (oil and gas extraction) that will possibly *conflict with present uses (fishing, recreation, transportation, etc.)*. . . .
>
> Stipulations, operating orders and tract deletion are the most prominent administrative mechanisms through which to apply environmental information. (Note: Stipulations are formulated and required at the lease sale stage.)."

Department of Interior, Bureau of Land Management, *Study Design for Resource Management Decisions: OCS Oil and Gas Development and the Environment* 2-1 (1978).

[39]As part of its objections to the leasing of certain tracts in the Santa Maria Basin in Lease Sale 53, the California Coastal Commission noted that "a large spill in the Santa Maria Basin, where BLM predicts 3.25 large spills over the life of the producing fields could jeopardize the entire population of the threatened sea otter." J. A. at 124. Moreover, contrary to petitioners' characterization, the Commission was concerned also about the protection of additional important resources, other than the sea otter. *Id.* at 122.

Similarly, the topography or weather conditions of an area may make valuable resource areas particularly vulnerable to OCS development.[40] Consistency with a management program which takes cognizance of these conditions may require that no development—again, regardless of its precise location—be allowed within that area. As a final example of a matter of concern in a management program, a tract under consideration for leasing may be unduly close to established pathways for ocean vessel traffic.[41] Depending on the circumstances, sufficient information may clearly exist in any of these situations to make decisions at the lease sale stage as to whether or not particular tracts should be offered.

The second important decision made at the leasing stage is the inclusion of particular stipulations as terms of the lease sale. As the District Court noted, stipulations may be drafted to "influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction . . . [and to] determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts." DOI Pet. at 45a-46a. For example, lease sale stipulations, together with tract selections, can provide assurance (or at least preserve the option) that pipelines, environmentally preferable in some cases to tankering as a means of bringing oil to shore, will be required in connection with the

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[40]The Coastal Commission expressed particular concern, for example, about the proximity of Lease Sale 53 to rocky areas along central and northern California with small coves or bays, where cleanup of oil spills would be difficult and the heaviest damage to marine life would occur. J.A. at 124. It also noted that wind and wave conditions near Elkhorn Slough, a National Estuarine Sanctuary, and Tomales Bay, adjacent to the Point Reyes National Seashore, would make containment of oil spills nearly impossible in those areas. *Id.*

[41]The Coastal Commission's comments on Lease Sale 53 expressed concern about this problem. *See* J.A. at 124.

development of tracts."[42] Indeed, as the Coastal Commission has itself noted in the context of Lease Sale 53, lease sale stipulations may be an effective alternative for avoiding the necessity of tract deletions, in order to protect resources identified as valuable in the coastal management program. J.A. at 77.

Without question, in some instances the decisions required to tailor OCS development to the provisions of a coastal management program will be appropriately made on a tract-by-tract basis when individual exploration or development plans are submitted to the state for consistency review under Section 307(c)(3)(B). Other decisions, as described above, are inherent in the selection or deletion of tracts and the setting of stipulations, and can thus only be made at the lease sale stage. As the Ninth Circuit observed regarding Lease Sale 53:

> "[A]t this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the latter stages consistency determinations would be made on a tract-by-tract basis under § 307(c)(3)." DOI Pet. at 13a.

In sum, these are "consistency problems which cannot be reviewed at all" under Section 307(c)(3)(B) or "for which such [later consistency] review comes too late." J.A. at 43.

B. Contrary to Petitioners' Assertions, Sufficient Information Exists to Make These Consistency Determinations at the Lease Sale Stage.

Petitioners assert that a host of "uncertainties" at the OCS leasing stage make it impossible to "guarantee" that all subsequent development will be consistent with a coastal management program. DOI Br. at 43. However, they do

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[42]Thus, tracts can be aggregated and leased concurrently so that they afford the greatest potential for sufficient oil developments occurring together to justify pipelines as an economical matter.

not take account of the information which is both available at the leasing stage and sufficient to make the kinds of determinations described above, and they improperly characterize the consistency review as requiring impossible "guarantees." Their own practices in prior lease sales belie the abstract arguments made here.

For many of the coastal management concerns associated with a particular lease sale, it is simply immaterial that there may be a "series of sequential unknowns" (DOI Br. at 45) which make it impossible for the Secretary to predict with certainty at the lease sale stage whether or precisely where OCS development will occur. If proposed tracts are in proximity to a particularly sensitive wildlife habitat or particularly volatile seas, he need not await the expenditures of significant sums of money by the oil companies in planning and exploration before deciding that these tracts are simply not appropriate for any kind of oil development.[43] Alternatively, these environmental conditions may dictate certain lease sale stipulations in order to achieve consistency with a management program,

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[43]Nor does Interior correctly portray the state of its own knowledge at the time a lease sale is made. Several years of preparation and study by Interior precede each lease sale. In addition to the information developed and reviewed in the draft and final environmental impact statements on Lease Sale 53, for example, special studies were done that included oil spill risk analyses, alternative oil and gas transportation scenarios, analyses of the sensitivity of marine life in the area to development disturbances, and air quality modeling of projected impacts of the lease sale. Moreover, as a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. *See, e.g.*, Final Environmental Impact Statement on OCS Lease Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9—1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a.

as previously noted—regardless of the precise location of development thereafter.[41]

At bottom, the asserted handicaps in making these kinds of determinations stem from a fundamental misconception of the nature of the consistency obligation. The application of Section 307(c)(1) to the lease sale does not require that the Secretary of the Interior issue impossible "guarantees," based upon "speculative assumptions" that all "hypothetical future activities" will be consistent with a coastal management program. DOI Br. at 49.

The essential inquiry in consistency review is not one which requires the capacities of a soothsayer. Rather, as the California Coastal Commission stated in its comments on Lease Sale 53, the question is whether the available information allows the Department of the Interior "on balance, *at this time* under the Management program to determine that there is *no way* to develop those tracts

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[41]In the example drawn by the Solicitor General (DOI Br. at 46), if there is "an unacceptably high risk" of an oil spill in the area of a particularly valuable fish or wildlife habitat but no similar concern associated with the potential development of "commercially valuable natural gas," the solution might be a lease stipulation that industry would only be allowed to produce gas and not oil on these tracts. Similarly, "if it may be possible," as the Solicitor General surmises, to develop a plan later that "will reduce the risk of an oil spill to a level acceptable to the state" (DOI Br. at 46), then it may also be "possible" to draft stipulations at the OCS leasing stage to provide the requisite assurances that development would not be allowed in the absence of such reduced risk. On the other hand, the Secretary might determine, based on the requirements of the management program, that it was not possible to reduce the risk to an acceptable level and delete the tracts at the outset. In any of these circumstances, industry and state and local governments would be able to proceed with their planning with an understanding of where development will be allowed and under what conditions, based on the Secretary's application of the coastal management program.

consistent with the policies of the California Coastal Act." J.A. at 78 (emphasis added).[45]

Indeed, the phased decisionmaking process established under OCSLA, upon which petitioners place such heavy reliance, does not require that all important decisions be deferred to later stages of the OCS process, as petitioners imply. DOI Br. at 27-35; WOGA Br. at 21-31. Decisions are made at each stage appropriate to the level of information available at that stage. As stated by the Court of Appeals for the District of Columbia Circuit, in reviewing Interior's five-year leasing program, the procedures embodied in the 1978 OCSLA Amendments are "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court rejected the same arguments made by Interior here, that the information at early stages of the OCS process was too "speculative" to consider:

> "Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) nonetheless requires the Secretary at the program stage to consider every factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained." *Id.* at 1307.

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[45] In its initial review of Lease Sale 53, the Commission determined that the information available at the time required the deletion of only 31 of the 113 tracts in the Santa Maria Basin of the OCS. The Commission made clear that it was not implying that "all development of the other 82 tracts would be consistent" when exploration or development plans were submitted, but only that there were no reasons, on balance, at that time to determine that there was "no way" to develop those tracts consistently with the management program. J.A. at 78.

In fact, in past lease sales the Department of Interior has made the very kinds of determinations that would be required of it in consistency review. For example, in Lease Sale 48, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel at the lease sale stage expressly for a purpose similar to one of the state's concerns in Lease Sale 53—"[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area.[46] In addition, Interior has previously conceded that imposition of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur.[47]

There is simply no practical foundation for petitioners' arguments that there is insufficient information at the lease sale stage to render meaningful determinations of consistency.

C. Deferral of Consistency Review to the Exploration and Development Phase Defeats the Essential Purposes of the CZMA.

If the strictures of a coastal management program are applied only to individual exploration or development plans on a tract-by-tract basis, then the broader concerns of the management program will be foregone entirely.

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[46]Letter from Secretary Andrus to Governor Brown (June 29, 1979). Similarly, in partial response to some of the other concerns expressed by the State of California with respect to Lease Sale 48, Secretary Andrus determined that there would be no petroleum exploration rigs in the vessel precautionary area outside the Ports of Los Angeles and Long Beach; determined that there would be no oil or development within six miles of the Santa Barbara Channel Islands, thus protecting the wildlife there from disturbance and preserving the option of designating that area as a marine sanctuary; and made the addition of petroleum reserves in the western Santa Barbara Channel more likely, thereby increasing the prospects for adequate oil production in that area to justify construction of a pipeline in place of tankers to carry oil to market. *Id.*

[47]Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11 at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

Moreover, the impetus which the CZMA was intended to give to *early* intergovernmental coordination—among federal, state and local governments—in dealing with coastal management problems, will be frustrated. Indeed, the federal government would thereby be excused from all responsibility to assure that *its activities* are consistent with coastal management programs. In all of these respects, petitioners' attempt to avoid consistency review at the lease sale stage defeats the basic purposes for Congress' enactment of the CZMA.

Evidence presented by respondents in the District Court graphically demonstrated the piecemeal and random manner in which the exploration and development plans in the Santa Barbara Channel, for example, were submitted by the lessees for the state's consistency review under Section 307(c)(3)(B). Affidavit of Mari Gottdiener, J.A. at 152-155. In the two and one half years after the federal approval of California's management program, 27 different exploration or development plans were submitted randomly for different tracts within this single area. *Id.* The broader concerns of the California coastal management program—*e.g.*, determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore support facilities should sensibly be located—are impossible to address when consistency review is this fragmented.

In *California v. Watt*, 668 F.2d 1290, 1306 (D.C. Cir. 1981), the court noted that "[w]hen a decision is being made on a particular lease sale, or a particular exploration, development or production plan, the focus of the inquiry is on the propriety of that particular lease sale or plan." Accordingly, the court concluded that it was impossible to address the broader concerns of OCS development (in that case, the five year leasing program) *"in the context of a decision on the placement of a particular exploratory well."* *Id.* at 1306 (emphasis added). Yet, this is precisely

the burden which petitioners here seek to thrust upon state and local governments by suggesting that consistency review can be deferred to the exploration and development phases.

In reviewing the five year leasing program, the court in *California v. Watt* emphasized that the earlier steps in the OCS process become "the basis for future planning by all affected entities, from federal, state, and local governments to the oil industry itself" (668 F.2d at 1299) and held that Congress therefore did not "envision the deferral" of Interior's consideration of the relevant factors until some later date when more information would be available. 668 F.2d at 1305. These same concerns underlie the Ninth Circuit's ruling in the instant case:

> "Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement." DOI Pet. at 14a.[40]

Finally, it bears emphasis that if consistency review is not undertaken at the lease sale stage, but is deferred to the time when exploration or development plans are submitted, then the "federal activity" in OCS development

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[40]Despite the Solicitor General's contrary assertion (DOI Br. at 42), "the immediate purpose of Section 307(c)(1)'s consistency requirement *is* . . . to provide coastal states with an opportunity to participate in the initial decisionmaking or planning stages of federal activities on the outer continental shelf." *See* S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("intergovernmental coordination for purposes of OCS development commences at the earliest practicable time").

escapes consistency review altogether and the Secretary of the Interior will never be required to take into account the coastal management program in this context. Once the lease sale occurs, the initiative passes to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant—not the Secretary—who must certify consistency at that stage under Section 307(c)(3). From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively—or, indeed, at all—by the federal government.

D. The Consistency Review Process Required Under Section 307(c)(1) Is Not Rendered Superfluous by the OCSLA Consultation Process at the Lease Sale Stage.

Petitioners also argue that Section 307(c)(1) is superfluous because of the opportunities for consultation accorded the states prior to OCS leasing under Section 19 of OCSLA, 43 U.S.C. § 1345. DOI Br. at 42. Indeed, petitioner WOGA argues that consistency review at the leasing stage is unnecessary because the coastal management program may be considered by the Secretary of the Interior through the back door of the consultation process under Section 19 of OCSLA. WOGA Br. at 26, 27. However, it is for Congress to decide whether its goals can be achieved through one statute or two, and it is clear that OCSLA and the CZMA were enacted to serve markedly different objectives (and establish distinctive procedures, as discussed *supra* at note 15).

The basic orientation of the CZMA and OCSLA differ considerably. As the District Court concluded in *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979):

> "The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational processes by which to regulate uses therein. Although sensitive

> to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns."

On the other hand, in *Commonwealth of Massachusetts v. Andrus*, 594 F.2d 872, 885 (1st Cir. 1979), the Court described the "emphasis" of OCSLA as the "exploitation of oil, gas and other minerals, with, to be sure, all necessary protective controls." Accordingly, it would be a mistake to assume that the same objectives could be achieved through the application of OCSLA that were intended to be achieved by Congress through the specific mechanisms set forth in CZMA.

This Court has, moreover, recently rejected a similar invitation to determine whether particular federal laws are "redundant or unnecessary." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 283 (1981). As stated in the *Hodel* case: "The short answer to this argument is that the effectiveness of existing laws in dealing with a problem indentified by Congress is ordinarily a matter committed to legislative judgment." *Id. See also Chemical Manufacturers' Ass'n v. Environmental Protection Agency*, 673 F.2d 507, 512 (D.C. Cir. 1982).

For the same reason, it is inappropriate for petitioners to argue that Congress' omission from the text of OCSLA of a specific reference to Section 307(c)(1) of the CZMA somehow disqualifies the latter provision from applying to OCS leasing.[49] Indeed, there are a number of statutes which

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[49]Petitioners argue that because OCSLA makes specific reference to the application of consistency review at the exploration and development stages of the OCS process, the omission from the statute of any reference to its application at the leasing stage is dispositive. *See* WOGA Br. at 21-31. However, as both petitioners concede, the legislative history of OCSLA itself shows congressional understanding that "under the [CZMA] . . . certain activities including *lease sales* and approval of development and production plans must comply with 'consistency' requirements. . . ." H.R.Rep. 590, 95th Cong., 1st Sess. 153 n.52 (1977). This unqualified statement, consistent with other Congressional expressions of intent

have application to OCS development which are not referred to in OCSLA.[50] Accordingly, there is no warrant for any restrictive reading of the consistency requirement in Section 307(c)(1) of the CZMA by reason of the existence of the OCSLA consultation process, or any provision in OCSLA itself.

IV. THE DECISIONS OF THE LOWER COURTS DO NOT PORTEND AN INCREASE IN LITIGATION OR A REDUCTION OF ENERGY DEVELOPMENT OR A LOSS OF FEDERAL-STATE COOPERATION

Petitioners raise the specter of additional litigation and reductions in OCS development and federal-state cooperation as the likely products of the decisions below. Although such contentions are more appropriately addressed to Congress' legislative judgment, there is no warrant for peti-

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discussed *supra* at note 14, certainly does not fit petitioners' characterization of it as "a meager indication" (WOGA Br. at 26 n. 19) or a "hint" (DOI Br. at 34 n. 26) of congressional intent. Even so, petitioners have omitted the immediately succeeding statements in the report which underscore Congress' intent with respect to OCS leasing:

> "Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan." H.R.Rep. No. 590, *supra* at 153 n. 52.

In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1866, which specifically provides that "nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972."

[50]These statutes include the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Deepwater Ports Act, 33 U.S.C. §§ 1501 *et seq.*

tioners' apprehensions that adherence to the decisions below will cause any disruption of OCS activities.

Consistency determinations are now being prepared by the Department of the Interior on all OCS lease sales without any apparent undue burden. *See* DOI Pet. at 19 n.18. In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if coastal management programs are applied in Section 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states and local governments are relegated to review of individual exploration and development plans under Section 307(c)(3)(B) at a later stage of the process. As the District Court found:

> "If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA." DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources.*" 44 Fed. Reg. 37142 (1979) (emphasis added). Indeed, after California's objections to Lease Sale 48 were communicated to the Secretary of the Interior, the Department of Interior (although refusing to make a consistency determination) did subsequently delete the tracts which California found objectionable and California did not bring suit. Thus, WOGA's characterization of the

CZMA process as "merely a prelude to later federal litigation" (WOGA Br. at 14) is misplaced.[51]

Finally, petitioners assert that the lower courts' construction of "directly affecting" makes it impossible for a federal agency to determine "which of its activities will be implicated by the state program" and renders its participation in the *development* of management programs superfluous. DOI Br. at 25 & n. 21. However, petitioners' arguments are belied *by their own participation* in the development of California's management program. In its comments on the program prior to federal approval, the Department of the Interior specifically addressed the issue of whether the program applied to OCS leasing under consistency review. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the management program. *See, e.g., id.* at 29, 33, 34, 37, 40.[52]

Petitioners' apprehensions are, moreover, beside the point. Congress has determined that the national interest in the coastal zone is best served by federally funded and approved coastal management programs, developed by states in cooperation with the federal government. Throughout its deliberations over the original enactment of the CZMA and its subsequent amendments and reauthorization, it has expressed its concern about the impact of OCS development on the coastal zone, and it has on a

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[51]In addition, the Coastal Commission concluded, in its comments on Lease Sale 53, that there had been relatively fewer consistency review problems on the tracts that were included in Lease Sale 48 but were reviewed in this mediation process, than in the case of tracts from earlier lease sales consummated before California's management program went into effect. J.A. at 117-118.

[52]Moreover, as discussed *supra* at 22-28, petitioners can scarcely claim to be surprised by the lower courts' construction of "directly affecting," since it was based on the legislative history of the CZMA's original enactment in 1972, subsequent Congressional statements on the subject and the NOAA regulations.

number of occasions unequivocally expressed its intent that OCS leasing be conducted consistently with approved coastal management programs. The lower courts did no more than give effect to this intent, as well as Congress' own formulations of what it meant by "directly affecting." Petitioners' reliance upon "policy considerations" and the provisions of a different statute—which do not conflict with the interpretations of the CZMA in the courts below—provides no support for a contrary interpretation.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit that Section 307(c)(1) of the CZMA requires the Secretary of the Interior to make a consistency determination concerning Lease Sale 53, should therefore be affirmed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

JAMES G. WATT, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes, policies, and legislative history of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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STATEMENT OF THE CASE

Respondents Natural Resources Defense Council, Inc. *et al.*, hereby adopt the Statement of the Case presented in their Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 1-8 (filed jointly herein with the State of California and the County of Humboldt, *et al.*), and the Statement of the Case presented by the State of California in its Brief of Respondents herein, which supplements the former Statement.

SUMMARY OF ARGUMENT

In the Coastal Zone Management Act of 1972 (CZMA), Congress created a mechanism to protect the national interest in the beleaguered resources of the nation's coasts. The CZMA encourages coastal states to create coastal management programs meeting the resource-protective standards it sets and to seek federal approval of these programs by the Secretary of Commerce. As an important incentive for state participation in this federal scheme, § 307(c)(1) of the CZMA requires that federal activities "directly affecting" a state's coastal zone must be conducted in a manner that is, to the maximum extent practicable, consistent with a state's federally-approved coastal management program. Both courts below concluded that federal oil and gas Lease Sale 53, proposed by the Department of the Interior (DOI) for the outer continental shelf (OCS) immediately adjacent to California's coastal zone, directly affects that zone and, therefore, must be conducted consistently with California's coastal management program. These decisions are well-reasoned and fully supported by the purposes, policies, and legislative history of the CZMA and should be affirmed.

However, petitioners argue that "directly affecting" should be defined by principal reference not to the CZMA, where the provision at issue appears, but to the Outer Continental Shelf Lands Act (OCSLA), an entirely different statutory scheme promoting petroleum development on the

OCS. They argue, in effect, that the OCSLA is the sole vehicle bestowing federal management authority over the resources of the OCS and, thus, that the CZMA cannot vest other governmental agencies with any OCS management authority that differs from that expressly provided by the OCSLA. However, this Court has specifically recognized that the OCSLA is merely one of several federal statutes, including the CZMA, through which Congress has allocated federal authority over OCS resources.

The provisions of the CZMA affecting OCS management are not subsumed by the OCSLA, but serve an independent national interest, the protection of the fragile resources of the nation's coastlines. This important interest can only be effectuated by applying the consistency provisions of § 307(c)(1) to federal activities with serious foreseeable consequences in the coastal zone, of which OCS lease sales are a prime example, at the earliest practicable time. Despite petitioners' arguments, to do so will not undermine the OCS development mechanisms set up by the OCSLA, for Congress has expressly harmonized the two acts, both through general statements of purposes and policies and through an explicit savings clause in the OCSLA. Thus, the commonsensical construction of "directly affecting" adopted by the courts below properly recognizes Congress' careful accommodation of the national interest in OCS oil production expressed in the OCSLA and the national interest in coastal protection expressed in the CZMA.

In defining "directly affecting," the lower courts properly ignored petitioners' suggestions to start their inquiry with the OCSLA and looked first to the best sources of interpretation of a provision of the CZMA: the purposes and policies behind that act, the legislative history of § 307(c)(1) itself, and the interpretation of the provision by the National Oceanic and Atmospheric Administration (NOAA), the agency charged by Congress to administer the CZMA. All of these sources lead inexorably to the definition of "directly affecting" approved by the lower courts, that a federal activity "directly affects" a state's coastal zone if it sets

in motion a series of events that have consequences in the coastal zone or, put another way, if the activity has a functional interrelationship with the federally-approved coastal program's land and water use policies. Ironically enough, even the relevant passages of the legislative history of the 1978 OCSLA Amendments point to the correctness of this definition and the conclusion that § 307(c)(1) applies to OCS lease sales.

Thus, the lower courts clearly did not err in holding that Lease Sale 53 directly affects California's coastal zone. The lease sale sets the scope for all subsequent activities on the tracts available for lease. It defines the geographic parameters for potential oil drilling in a hitherto undeveloped area of the OCS immediately adjacent to California's coastal zone. During the pre-leasing phase, DOI has formulated the generic lease stipulations that will govern environmental safety and other standards for the conduct of lessees' operations. Postponing application of the consistency requirements of the CZMA to later phases of the OCS oil and gas process—as petitioners urge—would preclude the states from playing any meaningful role in these decisions affecting the nation's vital coastal resources, in derogation of congressional intent. This Court should uphold Congress' carefully designed scheme to protect the national interest in our coasts through cooperative federalism by affirming the lower courts' definition of "directly affecting."

ARGUMENT

I

THE COASTAL ZONE MANAGEMENT ACT IS A VALID CONGRESSIONAL EXERCISE OF THE PARAMOUNT NATIONAL AUTHORITY OVER THE OUTER CONTINENTAL SHELF

In their Brief of Petitioners, the Western Oil and Gas Association, *et al.*, argue that the lower courts erred in holding that an OCS lease sale is a federal activity "directly affecting" the coastal zone within the meaning of § 307 (c)(1) of the CZMA, 16 U.S.C. §§ 1451 *et seq.*, § 1456(c)(1),

because so to hold would derogate the federal government's "exclusive proprietary control over the soil and seabed of the OCS." WOGA Br. at 17-18.[1] WOGA places great emphasis on the "1953 Compromise," the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, through which Congress ceded to coastal states proprietary control over the continental shelf within three miles (or, in two cases, three nautical leagues) of those states' low tide lines, as evidence that Congress intended exclusive jurisdiction over the OCS to be vested in DOI under the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, a part of that compromise. *Id* at 18.

While respondents do not deny the paramountcy of federal authority over the soil and seabed of the OCS, we do take issue with WOGA's assertion that the OCSLA is the sole vehicle through which that authority has been exercised and that DOI is the sole agent vested with OCS jurisdiction. The 1953 Compromise, the legislative history of the CZMA, other federal statutes, and prior pronouncements of this Court all plainly demonstrate that Congress has properly exercised federal jurisdiction over the OCS in a variety of ways, and that the consistency provisions of the CZMA are one such exercise.

The reliance of WOGA on the decision of this Court in *United States v. Maine*, 420 U.S. 515 (1975), to support its

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[1]For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Brief for Petitioners James Watt, *et al.*, are cited as "DOI Br. at ." References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, are cited as "WOGA Br. at ." References to the Petition for a Writ of Certiorari of James Watt, *et al.*, are cited as "DOI Pet. at ." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at a." References to the Petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

argument that DOI has exclusive jurisdiction over the soil and seabed of the OCS through the OCSLA is sorely misplaced. WOGA Br. at 18-19. In that case, the Court faced the issue of whether the Atlantic coastal states had jurisdiction over the OCS beyond the three-mile territorial limit established in the 1953 Compromise, by virtue of historical rights that these states asserted arose from their pre-1776 status as English colonies. The Court rejected their claims on the grounds that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty."[2] 420 U.S. at 524. The Court examined the states' claim that Congress, in the 1953 Compromise, which "did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act," repudiated those paramount rights. 420 U.S. at 525. It held that this was not the case, but rather that this grant of dominion was "merely an exercise" by Congress of the paramount federal authority over the OCS. 420 U.S. at 524-26.[3]

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[2]WOGA is of course correct that this Court recently reaffirmed that the United States has paramount rights to the OCS seabed beyond the three-mile limit in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981), and *Maryland v. Louisiana*, 451 U.S. 725, 752-53 n.26 (1981). WOGA Br. at 18. However, this principle does not translate, as WOGA would have it, into one of the paramount control of the OCS by DOI through the provisions of the OCSLA. DOI is not the United States, but merely one agency of the federal government. It is Congress that determines how the paramount national authority over the OCS is to be allocated, and, as its grant of control over the submerged lands within the three-mile limit in the 1953 Compromise demonstrates, it may even assign that authority entirely to the coastal states if it finds this to be in the national interest.

[3]A series of earlier decisions of this Court make clear that the federal government, prior to 1953, had dominion over all submerged lands beyond the marine low tide line. *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). Thus, in the 1953 Compromise, Congress ceded to the states what previously was a zone exclusively under federal jurisdiction.

It readily follows that, if Congress, in its exercise of federal jurisdiction over the seabed, can grant dominion over a portion thereof to the states, it most certainly can involve the states in a federal scheme of coastal management that allows them some lesser share of authority over the management of the OCS. The CZMA is one such scheme, as this court explicitly recognized in *United States v. Maine:*

> *Exploitation of our resources offshore* implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, *to the more recent Coastal Zone Management Act.*

420 U.S. at 528 (footnote omitted; emphasis added).[4]

That Congress had the power to provide authority over the OCS through enactment of the consistency provisions of the CZMA is affirmed by *United States v. Maine*; that it expressly intended to do so is apparent not only from the explicit reference to the CZMA in that decision but from the relevant legislative history of both the CZMA and the

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[4]The Court made plain that its reference was to resources of the OCS by citing with approval, in a footnote to the quoted language, a Senate Commerce Committee print that summarized the "legislation affecting the Outer Continental Shelf." 430 U.S. at 528 n.8. This report states:

> Several federal statutes contain policy objectives and *collectively* establish a legal and administrative system for the *management and control of outer continental shelf oil and gas development.*

Outer Continental Shelf Oil and Gas Development and the Coastal Zone, A Report for the Committee on Commerce, U.S. Senate, 93d Cong., 2nd Sess. 55 (Comm. Print 1974) (emphasis added). In addition to the OCSLA and the CZMA, this report lists the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, as among those that establish the federal system for management and control of OCS oil and gas development. *Id.*

OCSLA. As we will demonstrate, this legislative history plainly evidences the intent of Congress that the consistency provisions of § 307(c)(1) apply to DOI's OCS lease sales. *See* Part III.C. and D., *infra*.

In light of *U.S. v. Maine*, the legislative history, and other statutes that affect OCS management, WOGA's reliance on the "clear statement" rule is plainly misplaced.[5] WOGA Br. at 18. Congress did not assign exclusive control over the OCS to DOI in the 1953 Compromise.[6] Rather, as this Court recognized in *Maine*, the cession of dominion over the seabed to the coastal states in the Compromise

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[5]WOGA's citation of *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973), highlights a further irony of the "clear statement" doctrine WOGA presses upon this Court. WOGA Br. at 18. As the *Employees* case illustrates, this Court has regularly used the "clear statement" doctrine out of *solicitude* for legitimate state concerns. As in *Employees*, this Court should be "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat . . . states so harshly" as to deny federally-approved state programs all effect at the lease sale stage, when these sales have such extraordinary impacts upon the coastal zone. 411 U.S. at 286. The reasonable expectations of states which *voluntarily* enter into a cooperative partnership with the federal government should be protected—not frustrated, as WOGA would have it—by the clear statement doctrine. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Since OCS development has long been understood as one of "the most significant Federal actions affecting the coastal zones," *see infra at* 28-29, now to deny participating states a substantive role at the stage of OCS development "which establishes the basic scope and charter" for subsequent events, DOI Pet. at 13a, would retroactively destroy one of the principal original incentives for state participation. *See* H.R. Rep. 878, 94th Cong., 2d Sess. 53 (1975).

[6]The cases that WOGA cites for the proposition that the OCSLA is a comprehensive scheme for regulation of the OCS, preempting the field of OCS management, do not support that proposition. WOGA Br. at 31. At best, these cases simply conclude that specific provisions of the OCSLA are controlling in specific fact situations. The same could be said of the provisions of virtually any statute and would in no way indicate a congressional intent to make that statute the exclusive vehicle for regulation of a given field. More-

underscored Congress' authority to provide for the management of the OCS in whatever ways would best serve the national interest, and the CZMA represents another legitimate exercise of that authority. Thus, no "clear statement" of specific application to DOI's OCS leasing activities is necessary on the face of § 307(c)(1) in order for this provision to so apply.[7] The pronouncements of Con-

over, none of these cases involved the relationship of the OCSLA to the CZMA.

WOGA's claims of OCSLA exclusivity as regards management of the OCS also ignore other federal statutes that plainly affect its management (see n. 4, *supra*, and n. 7, *infra*) and, indeed, § 307(c)(3)(B) of the CZMA, which specifically creates a procedure for consistency certification of OCS lessees' activities at the exploration and development-production phases. 16 U.S.C. § 1456(c)(3)(B). Given the way in which WOGA presents its argument, it is apparent that it would like the Court to believe that this section of the CZMA, enacted in 1976, is actually a part of the 1978 OCSLA Amendments. WOGA Br. at 28, 30-31. But Congress in 1978 amended the OCSLA to recognize a provision affecting the management of the OCS that it had created two years earlier *as part of the CZMA*, not the reverse. WOGA's theory of OCSLA exclusivity in the management of the OCS simply cannot withstand the weight of other federal statutory provisions, both specific and general, that provide a share of OCS management authority to governmental entities other than DOI.

[7]An analogous situation is presented by the Marine Protection, Research, and Sanctuaries Act (Marine Sanctuaries Act), 16 U.S.C. §§ 1431-1434. That act authorizes the Secretary of Commerce, with presidential approval, to designate as marine sanctuaries certain offshore areas "which he determines necessary for preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values." 16 U.S.C. § 1432(a). Under the Marine Sanctuaries Act, the Secretary of Commerce must identify "the types of activities that will be subject to regulation" in the sanctuary, 16 U.S.C. § 1432(f)(1), and "shall issue necessary and reasonable regulations to implement the terms of the designation and control the activities described in it." 16 U.S.C. § 1432(f)(2).

Nowhere is DOI's OCS oil leasing program specifically mentioned on the face of the Marine Sanctuaries Act. Yet in two instances, pursuant to the Act, the Secretary of Commerce has designated, and the President has approved, marine sanctuaries in which

gress and this Court provide ample evidence of the propriety of such application.

II

WHILE THE TWO STATUTES ARE FULLY COMPATIBLE, THE COASTAL ZONE MANAGEMENT ACT SERVES NATIONAL PURPOSES DISTINCT FROM THOSE SERVED BY THE OUTER CONTINENTAL SHELF LANDS ACT. THESE PURPOSES CAN BE PROPERLY EFFECTUATED ONLY THROUGH BROAD APPLICATION OF THE PROVISIONS OF § 307(c)(1)

As previously noted, WOGA adopts the erroneous position that the OCSLA is the only federal statute affecting the management of the petroleum resources of the OCS. This faulty premise leads to WOGA's assertion that the OCSLA provides states with their sole means of involvement in the OCS leasing process. WOGA Br. at 21-31. To the extent that any provisions of the CZMA apply to DOI's OCS activities, WOGA attempts to portray them as part of the OCSLA statutory scheme. This argument

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leasing of OCS tracts for oil exploration and development is expressly forbidden. These are the Point Reyes-Farallon Islands Marine Sanctuary, 46 Fed. Reg. 7936 (1981), and the Channel Islands Marine Sanctuary, 45 Fed. Reg. 65198 (1980).

The routine application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, to OCS lease sales also makes manifest the error of WOGA's invocation of the "clear statement" rule. Nowhere in the OCSLA or NEPA is there an explicit statement that the general provisions of NEPA requiring the preparation of environmental impact statements will apply to DOI's OCS lease sale proposals, yet it is beyond dispute that these provisions fully apply to them. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977). The same is true of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq. See North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

Clearly, Congress has allocated authority over the OCS not only through the OCSLA, but through other statutory vehicles, and not only to DOI, but to other agencies. No "clear statement" regarding the OCSLA is necessary for Congress to effectuate a provision, such as § 307(c)(1), that further allocates OCS authority.

seriously misreads both the CZMA and the OCSLA, denying any independent meaning to various provisions of the former while reading into provisions of the latter meanings that Congress never intended and that are at odds with the statutory language.

As will be seen in what follows, the CZMA and the OCSLA are independent but fully compatible federal schemes promoting separate national interests, both of which affect the management of the resources of the OCS. While the OCSLA is aimed at the orderly development of petroleum reserves offshore, the CZMA is intended to provide protection for the sensitive resources of the nation's coastlines. To interpret the CZMA's consistency provisions as entirely subsumed in the provisions of the OCSLA—as WOGA would have it—would obliterate the distinct purposes for which Congress enacted the CZMA.

A. The Purposes of the Coastal Zone Management Act, and the Mechanisms Through Which Those Purposes Are To Be Carried Out, Are Distinct from Those of the Outer Continental Shelf Lands Act

WOGA's lengthy analysis of the OCSLA and, in particular, the scheme it creates for state involvement in the OCS leasing process, is intended to support its conclusion that the OCSLA provides the only vehicle for state involvement and, hence, that the requirements of the CZMA, to the extent they apply at all to OCS leasing, are completely subsumed by the OCSLA.[8] WOGA Br. at 21-31. However, this analysis completely ignores the vastly different national purposes served by the two statutes in question and the distinct mechanisms each provides for state involvement in leasing decisions.

The OCSLA is a statute focused upon the development of the mineral resources of the OCS. *See, e.g.*, 43 U.S.C. §§ 1332, 1802. The Secretary of the Interior and his department are charged with implementing the OCSLA.

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[8] While not arguing this point at any length, DOI seems to agree with WOGA's analysis. DOI Br. at 42.

43 U.S.C. § 1331(b). Provision is made in the OCSLA for affected coastal states and local governments, through their governors, to submit "recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." 43 U.S.C. § 1345(a). The manner in which the Secretary must respond to these recommendations is also prescribed. 43 U.S.C. § 1345(c).

The CZMA serves an entirely different purpose than the OCSLA, through a distinct statutory and regulatory scheme.[9] Its primary focus is on the protection of the national interest in the resources of the nation's coastal zones. See 16 U.S.C. §§ 1451-52.[10] To achieve this purpose, the Act provides for the promulgation of coastal management programs by the individual coastal states, which programs must meet the federal standards it prescribes. 16 U.S.C. §§ 1454-55. The Secretary of Commerce is empowered to approve proposed state coastal management programs if these meet the requirements of the Act. 16 U.S.C. §§ 1453(16), 1455. Among these requirements, a single state agency must be authorized to administer the coastal program. 16 U.S.C. § 1455(c)(5). Once a state's program receives federal approval, all federal agencies' activities "directly affecting" that state's coastal zone must be consistent, to the maximum extent practicable, with the program. 16 U.S.C. § 1456(c)(1). Under the Department of Commerce's regulations implementing this consistency requirement, it is the state's authorized coastal management agency that responds to a federal agency's initial

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[9] *See generally* Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Envt'l Affairs L. Rev. 429 (1981).

[10] *See also American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979) ("Although sensitive to balancing competing interests, [the CZMA is] first and foremost a statute directed to and solicitous of environmental concerns"). A more thorough discussion of the purposes and policies behind the congressional enactment of the CZMA is presented in Part III.E, *infra*.

determination as to the consistency of its proposed activity with the state's coastal program. 15 C.F.R. §§ 930.18, 930.41-.42.

The uniqueness of the two statutes is obvious, but several points of distinction specifically regarding their applicability to OCS lease sales bear further examination here. Section 19 of the OCSLA, 43 U.S.C. § 1345(a), allows a state's governor and, through the governor, local government executives, to make recommendations about the size, timing, and location of a proposed lease sale based upon the state's and local government's parochial concerns with the sale. Such officials in *any* coastal state that would be affected by proposed leasing may make these recommendations. *Id.* The Secretary of the Interior must accept the recommendations unless he determines that they do not provide "a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c).

In contrast, under the provisions of the CZMA and NOAA's regulations implementing it, DOI must ensure that its proposed lease sale is consistent, to the maximum extent practicable, with the state's federally-approved coastal management program through preparation of a consistency determination. 15 C.F.R. § 930.34. The state's coastal management agency, not its governor, responds to this determination. Only those states for which the Secretary of Commerce has approved a coastal management program can avail themselves of § 307(c)(1). DOI's determination and the agency's response are based not upon the state's and local governments' general concerns but solely upon the provisions of the federally-approved program.

Clearly, the types of state involvement in OCS leasing proposals envisioned by the two statutes are not interchangeable.[11] Compliance with the provisions of the OCSLA

[11]In the face of these radically different schemes, WOGA amazingly suggests that § 19 of the OCSLA is the proper vehicle through which a state should present its consistency concerns about a

does not replicate compliance with those of § 307(c)(1). The latter specifically require DOI to focus on the state's federally-approved coastal program and place upon DOI a duty to conduct its lease sale consistently, to the maximum extent practicable, with that program. The state coastal management agency, the agency with the greatest expertise on the provisions and application of the program, is afforded a formal mechanism for response. This process is intended to protect the national interest in the resources of the coastal zone through federal agency compliance with state-generated, federally-approved management programs. Neither § 19 nor any other provision of the OCSLA fulfills these purposes, and, thus, WOGA's attempt to portray application of § 307(c)(1) of the CZMA at the OCS leasing stage as redundant with or subsumed by those provisions must fail.[12]

B. The Consistency Provisions of the Coastal Zone Management Act Are Fully Compatible with the Provisions of the Outer Continental Shelf Lands Act

Related to its arguments that the consistency provisions of § 307(c)(1) are subsumed by the state involvement provisions of the OCSLA is WOGA's portrayal of the lower court's conclusion that § 307(c)(1) is applicable to OCS

proposed lease sale to the Secretary of the Interior. WOGA Br. at 27. WOGA would like the Court to ignore the divergent purposes the statutes serve and compress an independent statute whose requirements it finds inconvenient into another, less troublesome one. *See* H.R. Rep. No. 269, 97th Cong., 1st Sess. 11-12 (1981).

[12]The consistency provisions of the CZMA have always been viewed by Congress and the states as a major incentive for the states to create coastal management plans in compliance with the CZMA. *See, e.g.*, H.R. Rep. No. 878, 94th Cong., 2d Sess. 53 (1975). As federal oil and gas activities on the OCS are regarded "as among the most significant Federal actions affecting the Coastal Zones," Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n. 4, at 79, it would have been illogical for Congress, in § 307(c)(1), to have provided no duty regarding OCS leasing sales distinct from that in § 19 of the OCSLA, which is available to any coastal state, with or without a federally-approved coastal management program.

lease sales as incompatible with the purposes and policies of the OCSLA. WOGA Br. at 31-32; 44-46. DOI advances a similar view. DOI Br. at 41-49. Both raise the spectre that the lower courts' finding of applicability of § 307(c)(1) to OCS lease sales will thwart the national interest in OCS development as expressed through the OCSLA by giving states a veto over DOI's leasing plans. DOI Br. at 27, 47; WOGA Br. at 44-46.

An examination of the provisions and purposes of the OCSLA and the workings of § 307(c)(1) of the CZMA shows the fallacy of these arguments. The lower courts' application of § 307(c)(1) to DOI's OCS lease sales is fully consonant with the OCSLA; moreover, the express terms of § 307(c)(1), and the NOAA regulations implementing it, demonstrate that the provision does not grant the states veto authority over OCS lease sale proposals.

Turning first to the provisions of the OCSLA, while it is true that a primary purpose of that act is to promote the "expeditious and orderly development" of the oil and gas resources of the OCS, 43 U.S.C. § 1332(3), this is not the sole purpose or policy it is intended to serve. Indeed, such development is expressly "subject to environmental safeguards." *Id.; see also* 43 U.S.C. § 1802(2)(B), (7). Further,

> *the rights and responsibilities of all States* and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments *through such means as regulation of land, air, and water uses, . . . and of related developments and activity* should be considered and recognized.

43 U.S.C. § 1332(5) (emphasis added); *see also* 43 U.S.C. §§ 1332(4), 1802(4), (5), (6). Thus, while the OCSLA is aimed at orderly, and even expedited, development of oil and gas resources of the OCS, it is by no means a monolithic mandate to lease every acre of the OCS that might overlie recoverable petroleum regardless of a countervailing national interest in other resources and the potential adverse environmental consequences.

For its part, the CZMA requires state coastal zone management programs to have provided "adequate consideration of the national interest involved in planning for, and in the siting of [energy] facilities . . . which are necessary to meet requirements other than local in nature" before such programs may be approved by the Secretary of Commerce. 16 U.S.C. § 1455(c)(8); *see also* 16 U.S.C. § 1454 (b)(8). Prior to such approval, the Commerce Secretary must also ensure that the views of the federal agencies affected by the proposed program were adequately considered during its promulgation. 16 U.S.C. § 1456(b).[13]

These provisions from both acts plainly reveal that their purposes and policies are not antithetical. Rather, Congress has expressly harmonized the two schemes. Thus, to the extent that a state coastal management program, federally approved pursuant to the requirements of the CZMA, circumscribes OCS leasing decisions by DOI under the provisions of § 307(c)(1), this is fully in keeping with the purposes and policies of both acts. Read together, the CZMA and the OCSLA promote the national interest in offshore oil development responsive to the protection of other coastal resources.

Very explicit evidence that the application of § 307(c)(1) to OCS lease sales is compatible with the provisions of the OCSLA is provided by the savings clause of the OCSLA Amendments of 1978, which states:

> Except as otherwise *expressly provided* in this chapter nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972. . . .

43 U.S.C. § 1866(a) (emphasis added). This provision completely undercuts the claims of DOI and WOGA that the state involvement provisions of the 1978 OCSLA Amendments comprise an expression by Congress that the provi-

[13] DOI was among the agencies whose views were considered in the formulation of California's program. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J.

sions of § 307(c)(1) do not apply to DOI's OCS lease sales.[14] DOI Br. at 28-30; WOGA Br. at 32.

Finally, we must lay to rest the fears raised by petitioners that the lower courts' determination that

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[14]Petitioners' reliance on § 307(e) of the CZMA, 16 U.S.C. § 1456(e), a general savings clause, for the proposition that § 307(c)(1) does not apply to OCS lease sales is unavailing. DOI Br. at 26; WOGA Br. at 39. First, it completely ignores the fact that NOAA, in its regulations concerning the consistency provisions of § 307(c)(1), has specifically addressed § 307(e):

> The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

15 C.F.R. § 930.32(a). In a comment to this regulation, NOAA noted: "Federal agency conformance with existing law is preserved as a result of section 307(e) of the Act. . . ." 44 Fed. Reg. 37146 (1979).

Second, the correctness of NOAA's analysis of § 307(e)—that it is simply intended to make clear that the required federal consistency with federally-approved CZMA programs is itself circumscribed by the requirements of existing law—is borne out by the legislative history of § 307(c)(1). The history of that specific provision demonstrates Congress' intent that it "cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies," including DOI's OCS leasing decisions. See Part III.C., *infra*. To read the general provisions of § 307(e) to deny a substantive application of § 307(c)(1) to OCS lease sales—and, by implication, other federal activities—would improperly override the express intent of Congress.

Finally, petitioners once again promote the erroneous notion that DOI *is* the federal government. While the CZMA shifted some federal jurisdiction, rights, and responsibilities "in the field of planning, development, or control of . . . submerged lands" from DOI to the Department of Commerce, this scarcely amounts to a diminution of *federal* jurisdiction in contravention of § 307(e).

§ 307(c)(1) consistency applies at the lease sale stage will somehow amount to a state veto, derailing the OCS development scheme created by Congress in the OCSLA. None of the respondents has ever maintained that § 307(c)(1) provides states a veto over DOI's leasing proposals. An examination of the section and NOAA's regulatory scheme for its implementation plainly shows that no such veto exits.

The duty that § 307(c)(1) imposes is upon the federal agency conducting the activity—here DOI—not on the state. It is DOI's duty under the section to conduct its activities in a manner consistent to the maximum extent practicable with the state's coastal management program. Thus, NOAA's regulations provide that it is DOI that performs the consistency determination for its proposed activity and submits that determination to the state. 15 C.F.R. §§ 930.34, 930.37. The state is given a formal opportunity to respond to the DOI consistency determination. 15 C.F.R. § 930.41-.42. In the event of a serious disagreement over consistency, either party may seek mediation by the Secretary of Commerce. 15 C.F.R. § 930.43[15] However, if mediation is not sought or proves unsuccessful, DOI may, at its discretion, go forward with the proposed lease sale based on its consistency determination.[16] If DOI does proceed in the face of a dispute, the state may of course exercise its option to sue in order to enjoin the proposed lease sale. In that event the court will examine the propriety of DOI's consistency determination, *i.e.*, it will

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[15] *See generally* 15 C.F.R. §§ 930.110-.116. Mediation is only available if all agencies in disagreement consent to participate. 15 C.F.R. § 930.112. It is not mandatory upon the parties to the disagreement nor, consequently, prerequisite to judicial review. 15 C.F.R. § 930.116.

[16] While a comment to the NOAA regulations encourages federal agencies to "suspend implementation of the activity beyond the 90-day period [of notice to the state that the regulations require] pending resolution of the disagreement," 44 Fed. Reg. 37149 (1979), it is clearly within a federal agency's discretion to go forward with a disputed activity if it determines to do so.

review the Secretary of the Interior's application of the provisions of the state's federally-approved coastal management program to the lease sale at issue.

In sum, under § 307(c)(1) as applied to a proposed OCS lease sale, *DOI* makes the consistency determination, *DOI* decides whether to go forward with the sale in the face of a dispute with a state's coastal management agency, and *DOI*'s application of the provisions of the state's program (itself approved by the Secretary of Commerce as in conformity with the national requirements of the CZMA) is the subject of any judicial review that follows.[17] This scheme can scarcely be characterized as a state veto of a federal program. Quite plainly, it represents a federal mechanism for the reconciliation of two important but sometimes competing national interests, offshore oil production and coastal resource protection. This mechanism, carefully wrought by Congress and the agency charged with implementing Congress' intent, should not be set aside in the name of protecting one federal agency, which erroneously purports to be the sole repository of federal management authority over the OCS, from alleged "state interference" that is actually an integral part of a national program of cooperative federalism.

III

THE MEANING THE LOWER COURTS GAVE "DIRECTLY AFFECTING" IS THE PROPER ONE

Petitioners urge that this Court bend the obligations and statutory duties created by the CZMA to match the special procedures of the OCSLA. WOGA Br. at 21-31; DOI Br. at 27-35. But to "look first to [the] provisions" of the OCSLA, WOGA Br. at 21-22, and then to insist that the CZMA be given a crabbed reading in order to assure that its requirements never go beyond the OCSLA's is to do things backwards by ignoring the CZMA itself, its pur-

[17] It is also worthy of note that, if a state abuses its coastal management program, the Secretary of Commerce can withdraw approval. 16 U.S.C. § 1458(d).

poses, policies, and history. Despite the lip service petitioners pay to the "plain meaning" rule, the structure of their argument is essentially designed to outflank the self-evident proposition that where a statutory provision is to be construed, this Court should look first to the statute in question. Once the language, statutory purposes, legislative history, and agency interpretation of *the CZMA* are examined in any detail, it becomes evident that the construction of § 307(c)(1) adopted by the courts below is correct.[18]

A. Petitioners' Invocation of the "Plain Meaning" Rule Is Misguided

The starting place in every case involving construction of a statute is the statutory language itself. *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1587, 1591-92 (1983). However, this rule is not to be applied rigidly. As this Court recently held, the plain meaning rule is "rather an axiom of experience than a rule of law." *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48-49 (1928)); *see also Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

The District Court properly held that the exact meaning of § 307(c)(1)'s threshold "directly affecting" language is neither clear nor unambiguous; the Act itself provides no definition of the phrase. DOI Pet. at 41a. As even a cursory review of this court's decisions demonstrates, the words "direct" and "directly" mean different things in different contexts, and a definition correct in one setting cannot be mechanically applied to another. *Compare, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) ("direct" implies "proximate" causation) *with United States v. SCRAP*, 412

[18]Every court that has examined this issue so far has reached the same result. *See Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass. 1983), *appeals pending*, 83-1258 (1st Cir.) (Lease Sale 52); *Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal., June 9, 1982) (Lease Sale 68).

U.S. 669, 687 (1973) (chain of causation with several intermediate links would "directly harm" plaintiff group and give it a "direct" stake in an Article III controversy) and *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1591-99 (policies underlying statutory phrase "directly pertain" informed judicial distinction between "direct" costs and "indirect" costs). Petitioners' strained arguments notwithstanding, the words "directly affecting" do not on their face present a self-defining standard whose "plain meaning" obviates recourse to the purposes, policies, history, and administrative interpretation of the CZMA.

In the District Court, petitioners offered a variety of definitions of the word "direct" from a dictionary. Ultimately, however, the "plain meaning" they assigned the term was a definition of their own making, which selectively combined those particular definitions that suited their purposes and ignored the rest. DOI Br. at 58a-59a. Continuing their semantic sophistry in this Court, petitioners argue that "conventional construction" of the term "directly" requires that the condition invoked shall operate "proximately" or "without any intervening agency, instrumentality or influence." DOI Br. at 21-22.

However, as the District Court correctly noted, tort concepts of "proximate" and "intervening" cause were created by the courts to *limit* tort liability and are irrelevant to a statute designed to *foster* intergovernmental cooperation and coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. WOGA Br. at 36-37; DOI Br. at 22 n.19. This reliance on a definition adopted by an agency without

any responsibility for interpreting the CZMA,[19] defining an unrelated statute designed to serve different policies, and promulgated several years *after* the passage of the CZMA and the 1976 CZMA Amendments—indeed, after the California Coastal Management Program had been duly created by the state and approved by the federal government[20]—is sorely misplaced. In fact, petitioners elsewhere acknowledge important differences between NEPA and CZMA review but fail to grasp their significance. WOGA's Reply Brief of Petitioners (on Petition for Certiorari) at 1-2, DOI Br. at 45-46. Precisely because § 307(c)(1) consistency review is substantive—not procedural, like NEPA review—foreseeable effects with extraordinary significance for the coastal zone should be reviewed as early as possible. In the words of the Senate Commerce, Science and Transportation Committee, § 307 (c)(1) review allows "Federal agencies . . . to conform their activities to State coastal zone management requirements *before* committing public resources to an effort which might be found to be inconsistent." S. Rep. No. 783, 96th Cong., 2d Sess. 10 (1980) (emphasis added). The CZMA goals of comprehensive coastal planning and maximal intergovernmental coordination would obviously be frustrated by disregarding the state coastal plan until the long-foreseeable effects of OCS development are so imminent that the state cannot adequately plan for them. *See* DOI Pet. at 46a.

In short, it is surely no departure from any "plain meaning" of § 307(c)(1) to say that the "direct" effects of a lease are the intended and foreseeable uses for which

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[19]Curiously, at the same time that they seek to invoke these regulations implementing NEPA, they disregard the regulations implementing § 307(c)(1) that were adopted by NOAA, the one agency to which Congress gave CZMA responsibility. DOI Br. at 36-38. *See* discussion in Part E., *infra*.

[20]The California Coastal Management Program was approved on November 7, 1977. The NEPA regulations cited by petitioners were issued Nov. 29, 1978. *See* 43 Fed. Reg. 56003 (1978).

the tract was leased—in this case, oil and gas development.[21] The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the federal activity, the sale of leases, any less "direct."[22]

B. The Purposes and Policies of the CZMA Support the Lower Courts' Construction of Section 307(c)(1)

Precisely because the "directly affecting" clause is capable of various interpretations—because, that is, petitioners are wrong in asserting that the clause has one and only one obvious and self-defining "plain meaning"—a careful analysis of the CZMA's purposes and policies is in order.[23]

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[21]Petitioners also suggest that a "direct effect" under § 307(c)(1) must be "physical" as well as immediate. DOI Br. at (i), 2, 21; WOGA Br. at 12, 16, 26 n.19, 27. Such a suggestion not only is a fabrication out of whole cloth, but also is inconsistent with the language and policies of the CZMA addressing a wide range of coastal zone effects, including economic, social, demographic, cultural, residential, aesthetic, recreational, commercial, and industrial impacts. 16 U.S.C. §§ 1451-52.

[22]This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other "federal activity" —however "indirect"—to consistency review, as petitioners imply. *See, e.g.*, DOI Br. at 24-26. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize "effects" on a state's coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates "indirectly," or, to use petitioners' terms, "mediately, remotely or collaterally". Although DOI warns of the dire effects of accepting the lower courts' interpretation of "directly affecting," its heroic efforts to drum up a parade of horribles are unpersuasive. In fact, the entire parade consists of a lone participant, a hypothetical involving coal leasing in Wyoming, DOI Pet. at 20 n.21, that is easily distinguishable from this case. *See* Brief in Opposition to Petitions for a Writ of Certiorari at 28 n. 37.

[23]*See Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1592 n.7, where this Court looked to the purposes underlying the statute in question to inform the meaning of the phrase "directly pertain," a phrase that, like "directly affecting," is not self-defining.

Such an analysis confirms the correctness of respondents' and the lower courts' common sense approach to the meaning of the clause.

The CZMA was enacted by Congress in 1972 because of the recognized need for increased protection of the natural, biological and physical resources of the coastal zone. The CZMA emphasizes the "[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone," 16 U.S.C. § 1451(e), and states that population growth and economic development, including mineral extraction and fossil fuel development, "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion." 16 U.S.C. § 1451(c).

In passing the Act, Congress was responding to national problems. The Senate Report emphasizes that passage of the Act was based on the following findings: that by 1964, over one quarter of the nation's salt marshes had been destroyed; that the commercial fishery of the United States depends on coastal and estuarine waters and marshlands as fish nursery areas and spawning grounds; that increased commercial and recreational demand in the coastal zone endangers biologic organisms; and that the fragmentation of state and local government authority in the coastal zone has exacerbated pressure for economic development. S. Rep. No. 753, 92d Cong., 2d Sess. 2-6 (1972). *See also* H. R. Rep. No. 1049, 92d Cong., 2d Sess. 10 (1972).

Underlying the whole congressional consideration was the recognition that existing statutes and institutions had been unable to curb the abuses of coastal resources. This is reflected in the specific finding in the CZMA that existing legal and institutional frameworks were inadequate to address the coastal problems facing the nation. 16 U.S.C. § 1451(h). In light of this finding, states were called upon to develop comprehensive programs to manage their coastal resources. The 1972 Senate Report specifically states that "[t]he intent of this legislation is to enhance state au-

thority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." S. Rep. No. 753 at 1.

To induce the states to develop and implement comprehensive management programs, Congress provided that federal activities must be consistent with the approved programs. § 307(c), (d) of the CZMA; 16 U.S.C. § 1456(c), (d). This requirement is the principal permanent inducement to a state's development of a coastal management program. DOI Pet. at 43a-44a. It assures the state a central role in managing its coastline and prevents federal actions from undermining the state's plan once federally approved. Any interpretation of the phrase "directly affecting" in § 307 (c)(1) must give due consideration to this central role the CZMA gives coastal states in planning for and managing development affecting their coasts. Unless states are involved in planning for such development, the comprehensive management programs that Congress found were needed to serve important national interests will be severely undermined.[24]

C. The Legislative History of the CZMA Confirms the Lower Courts' Construction of Section 307(c)(1)

The legislative history of the CZMA overwhelmingly supports the Ninth Circuit's and the District Court's interpretation of § 307(c)(1). The CZMA was enacted in 1972, and amended in 1976 and 1980. In 1971, while favorably report-

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[24]Also worthy of special note is § 303 of the 1972 CZMA:

> The Congress finds and declares that it is the national policy . . . (c) for *all* Federal agencies engaged in programs *affecting* the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter.

16 U.S.C. § 1452(c) (emphasis added). While modifying the language of § 303 in 1980, Congress specifically noted that the section as amended continues to support application of § 307(c)(1) to DOI's *OCS lease sales*. H.R. Rep. No. 1012, 96th Cong., 2d Sess. 35 (1980).

ing an earlier bill that would have required consistency for federal agency activities "in the coastal zone," the Senate Committee on Commerce declared:

> [I]t is intended that any lands or water under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and water within the coastal and estuarine zone, should be administered consistent with approved State management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971); *see also id.* at 20. Foreshadowing the "directly affecting" standard that eventually was adopted as part of the 1972 CZMA, the above-cited language evinces a congressional intent that the federal agency consistency provisions be interpreted in a liberal, commonsensical, and *functional* way—not in a narrow and technical fashion as petitioners urge. This "functional interrelationship" formulation was subsequently adopted by the House Committee on Merchant Marine and Fisheries,[35] and has been quoted with approval and relied upon by NOAA in its consistency regulations.[36] It clearly supports the decisions of the courts below.

1972: The "directly affecting" language at the core of this case was first added by the 1972 Conference Committee. Prior to conference, both House and Senate versions spoke only of consistency for agency activities "in the coastal zone." In the face of this clear congressional choice to *expand* the agency consistency requirements, DOI curiously attempts to portray the conference substitution as a restrictive compromise "drafted to serve a limiting function." DOI Br. at 23-24.

According to DOI, the "directly affecting" substitution was the result of a decision to split the difference between

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[35] H. R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980).

[36] *See, e.g.*, 44 Fed. Reg. 37143 (1979).

the House and Senate definitions of the coastal zone in § 304. Federal lands had been excluded by definition from the coastal zone in the Senate Bill, but they were included in the House version. In conference, DOI suggests, the Senate coastal zone definition was retained in § 304, and the words "directly affecting" were inserted in § 307(c)(1) "to identify those activities on federal lands within the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." *Id.* at 24. There are two serious problems with DOI's argument.

First, it logically proves too much. If, as DOI suggests, the "directly affecting" language was designed simply as a middle position between two definitions of the coastal zone, then areas completely outside the zone, such as the OCS, would be generically exempt. Yet this conclusion is inconsistent with DOI's position before the Ninth Circuit that § 307(c)(1) *does* apply to OCS pre-leasing activity.[27] Transcript of Oral Argument Before Ninth Circuit (January 15, 1982) at 10. In fact, later in its brief before this Court, DOI continues to suggest that it agrees with the Department of Justice's position that the applicability of § 307(c)(1) to an OCS lease is a question that cannot be answered generically but must be determined on a case-by-case basis. DOI Br. at 37 n.30; *see also* WOGA Br. at 26 n.19.

Second, DOI's argument that the phrase "directly affecting" was "drafted to serve a limiting function" is absolutely unsupported by the legislative history of the Conference Committee. Indeed, DOI admits as much.[28]

[27] It is, of course, also at odds with the "plain meaning" of the language of the conference substitute, which evinces no hint that federal lands inside the coastal zone (as that zone had been defined by the House) are to be treated any differently from federal lands outside the zone; rather, the same threshold—"directly affecting"—was to apply to *all* federal activities wherever these occurred.

[28] In light of this concession, it is a mystery how DOI's position concerning the legislative intent of the clause is at all "evident." DOI Br. at 22.

DOI Br. at 23. Many changes, modifications, additions, deletions, and compromises were effected in conference, and it is only by a leap of faith that DOI can assert that the conferees' decisions concerning two distinct and unrelated sections of the CZMA, §§ 304 and 307(c)(1), were in any way connected.[29] DOI's historical revisionism notwithstanding, the District Court was correct in reading the language of the conference substitute as an *expansion* of the geographic scope of § 307(c)(1).[30]

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[29]In discussing the 1972 legislative history, WOGA cites language from Senator Hollings on the Senate floor. WOGA Br. at 38. The Senator's comments, however, are obviously irrelevant to the meaning of "directly affecting" since they were delivered *before* the conference committee's expansion of the more restrictive language in the original Senate bill, which did limit federal consistency to activities *in* the coastal zone.

[30]Moreover, the admittedly slender 1972 legislative history that *does* exist concerning the precise meaning of "directly affecting" supports the decisions of the lower courts. The most plausible account of the Conference Committee's choice to expand the provisions of § 307(c)(1) by substituting the words "directly affecting" is that such an expansion was intended to complement the conference's acceptance of similarly expansive language in § 307(c)(3). In the Senate bill, both (c)(1) and (c)(3) had the same geographical scope. When the conference committee instead adopted the House version of (c)(3), which applied to the issuance of federal licenses and permits "affecting land or water use in the coastal zone," it simultaneously adopted the "directly affecting" clause, so that once again the geographic scope of the two complimentary consistency provisions—(c)(1) and (c)(3)—was roughly the same.

Such a reconstruction of the legislative intent is buttressed by the Conference Committee's suggestion of the relatedness of the two consistency provisions and their similar geographic thresholds: "As to the use of [federal lands not included within a state's coastal zone] which would *affect* a state's coastal zone, the *provisions* of section 307(c) would apply." H.R. Conf. Rep. No. 1544, 92nd Cong., 2d Sess. 12 (1972) (emphasis added). This history suggests that petitioners place too much emphasis on the differences between the (c)(1) and (c)(3) thresholds, *i.e.*, the importance of

In the end, the most that can be said on petitioners' behalf concerning the 1972 legislative history is that some ambiguity may exist regarding the meaning of "directly affecting." Any ambiguity, however, has subsequently been eliminated by regular and consistent congressional declarations supporting the applicability of § 307(c)(1) to OCS lease sales.

1974: In 1974, a print released by the Senate Committee on Commerce specifically cited the CZMA as one of "several Federal statutes [that] *collectively* establish a legal and administrative system for the management and control of outer continental shelf oil and gas development."[31] In another passage describing the CZMA regime in detail, the print reads:

> States that adopt management programs consistent with Federal guidelines gain additional leverage in dealing with the Federal government[.] Federal activities, or those licensed by the Federal government

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"directly" as a restrictive qualifier. DOI Br. at 21, WOGA Br. at 35. *See also* n.24, *supra.*

We do not contend here that the thresholds for (c)(1) and (c)(3) are identical, because the language of the two provisions does differ, and, where possible, every word of a statute should be given effect. *Bowsher v. Merck & Co., Inc.*, 103 S. Ct. at 1593. We do contend, however, that petitioners' overly restrictive and technical reading of "directly" is unwarranted in light of the expansive purpose that these sources indicate underlie the insertion of the phrase "directly affecting the coastal zone."

In contrast to *Bowsher*, where the word "directly" was specifically introduced as an amendment to *restrict* the pre-existing statutory phrase "pertaining to," here the phrase "directly affecting" was specifically introduced to *expand* earlier statutory language.

[31]Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n.4, at 55 (emphasis added). Specifically noting the CZMA's requirement of "consistency of Federal programs," the report goes on to declare:

> The Secretary of the Interior is authorized to grant oil and gas leases on the shelves and is also responsible for administering the leases including prescribing the rules necessary for regulat-

> that affect a state's coastal zone must in general, be consistent with the State's approved management program. This gives the States influence in dealing with the Federal government where differences of opinion exist concerning proposed Federal actions that would affect the coastal zone. OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 79. Thus, both § 307(c)(1), governing "Federal actions," and (c)(3), regulating "those licensed by the Federal government," were viewed as applicable to OCS development, in the broad sense of that term, *i.e.*, opening the OCS to commercial exploitation.

1975: The following year, in favorably reporting its version of amendments to the CZMA, the Senate Commerce Committee noted:

> There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, *such as the decision to lease* large tracts of the OCS for oil and gas development. . . . Full implementation of the Coastal Zone Management Act of 1972 and recognition of its capability to solve energy-related conflicts could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 1770 (emphasis added). Pointing out that "States are likely to be significantly affected—economically and otherwise—by Federal *leases* for oil exploration and production on adjacent OCS

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ing oil and gas development *in a manner consistent with Acts listed above.*

Id. at 55-56 (emphasis added). Since this passage speaks of the obligations of the Secretary of the Interior himself, and not of private applicants, it can only refer to the applicability of § 307 (c)(1) to the OCS leasing process.

lands," *id.* at 11, the Report goes on to discuss the applicability of the CZMA consistency measure to the OCS:

> Section 307 is the portion of the Act which has come to be known as the "Federal consistency" section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving and developing the State's coastal zone is in place (approved), the *Federal departments, agencies and instrumentalities* will not violate such a system but will, instead, conduct themselves in a manner consistent with the State's approved management program. *This includes conducting or supporting activities in or out of the coastal zone which affect that area.*

Id. at 36-37 (emphasis added). The last sentence is an unambiguous reference to the provisions of § 307(c)(1), using, as it does, the "conducting or supporting" language of that section. This discussion continues by describing the provisions of § 307(c)(3) and concludes with the following passage demonstrating that *both* (c)(1) and (c)(3) apply to the OCS:

> [T]he law already provides an effective mechanism for guaranteeing that Federal activities, *including* those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of *Federal activities* on the Outer Continental Shelf beyond the state's coastal zones, *including* Federal authorization for non-Federal activity, but *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the *consistency requirements do apply.*"

Id. at 37 (emphasis added). "Federal activities" are governed by (c)(1); "non-federal activities" carried out pur-

suant to federal authorization are subject to (c)(3). Both sections were designed to apply to the OCS "if the activity may affect the State coastal zone." *Id.*[32]

The House Report is also illuminating:

> [T]he Committee wants to assure coastal states in frontier areas that the OCS *leasing process* is indeed a *federal action* that *undoubtedly* has the potential for affecting a state's coastal zone and, hence, must conform with approved state coastal management programs. . . Given the obvious impacts on coastal lands and waters which will result from the federal action to permit exploration and development of offshore petroleum resources, it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of "federal consistency." . . . One major encouragement [to coastal states] has been the belief that in the future, the impacts which flow from federal Outer Continental Shelf leasing will have to conform to state and local prescriptions about the best location for energy support and industrial facilities. The Committee be-

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[32]DOI is thus simply wrong when it asserts that "no one suggested that the consistency provision of section 307(c)(1) applied to lease sales." DOI Br. at 33. In addition to the references to (c)(1) applicability in the Committee report discussed *supra*, clear and unambiguous statements of (c)(1)'s applicability appear in Congressional Research Service, "Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, A Study Prepared for the Ad Hoc Select Committee on Outer Continental Shelf," 94th Cong., 2d Sess. 93 (Comm. Print 1976) (hereinafter cited as "Effects"); Oceans Programs, Office of Technology Assessments, "Offshore Oil and Gas Development, A Study for the Ad Hoc Select Committee on Outer Continental Shelf," 95th Cong., 1st Sess. 155-157 (Comm. Print 1977) (hereinafter cited as "Offshore Oil"); H. R. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979); S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980); H. R. Rep. No. 1012, 96th Cong. 2d Sess. 28 (1980); H. R. Rep. 269, 97th Cong., 1st Sess. 14 (1981) (Additional Views of Congressman Studds and d'Amours).

> lieves it would break faith with the states not to state plainly its clear intent to include major federal actions as Outer Continental Shelf leasing under the "federal consistency" section.

H. R. Rep. 878, 94th Cong., 2d Sess. 37, 52-53 (1975) (emphasis added).

1976: Petitioners make much of the fact that in Conference, Congress decided not to insert the word "lease" into § 307(c)(3), but instead adopted the provisions of what is now § 307(c)(3)(B). DOI Br. at 31-35; WOGA Br. at 40-42. Their argument is fundamentally misconceived. As discussed in more detail in Part IV.B., *infra*, Sections (c)(1) and (c)(3) contain different statutory language, apply to different actions, establish different consistency standards, and address different parties. The most that can be said of the Conference Committee's substitution of § 307(c)(3)(B) is that the *applicant* for a federal OCS lease does not have to engage in a § 307(c)(3)(A) consistency determination before obtaining the lease. But as both the Justice Department and the District Court have noted, petitioners' argument that the passage of § 307(c)(3)(B) somehow displaces § 307(c)(1) must be rejected as an impermissible repeal by implication. DOI Pet. at 48a; Department of Justice Opinion, J.A. 42, Cal. Exh. L-15,[33] *see Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). In addition, petitioners' assertion completely contradicts their concessions elsewhere that § 307(c)(1) does apply to federal OCS lease sale decisions.[34]

[33] NOAA's regulations are in accord: Non-OCS leases *are subject* to § 307(c)(3)(A), OCS leases are not, and DOI's pre-lease activity is subject to (c)(1). 15 C.F.R. § 930.51(a) (comment), 44 Fed. Reg. 37150 (1979); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

[34] Two further points are in order concerning the 1976 legislative history. First, the history of the (c)(3) amendments highlights the error of petitioner WOGA's insistence that a statutory provision must be accompanied by a "clear statement" that it applies to

1980: In 1980, Congress conducted a comprehensive examination of the CZMA and enacted the Coastal Zone Management Improvement Act of 1980.[35] As both houses were aware of the dispute between California and DOI over the meaning of the "directly affecting" clause and the applicability of § 307(c)(1) to OCS leases, both Committee Reports specifically and carefully addressed those issues, sending the parties and the courts a distinctively clear message:

> The Department of the Interior's activities which preceded lease sales [are] *to remain* subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development *commences* at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone. Coordination

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DOI's OCS activities. *No one* in Congress in 1976 doubted that with the insertion of the word "lease," § 307(c)(3) would apply to *OCS* leases. Second, and relatedly, the House and Senate Reports and Floor debates clearly demonstrate Congress' belief that even *without* the addition of the word "lease," (c)(3) applied to OCS leases. Insertion of the word "lease" was a "technical" amendment, a "clarification" of "our original congressional intent." S. Rep. No. 277 at 19, 36; H. R. Rep. 878 at 52-53; 122 Cong. Rec. 23053 (comments of Sen. Hollings), 23084 (comments of Sen. Williams) (1976). The various congressional statements obviously contradict WOGA's assertion that

> there is no basis in the CZMA or OCSLA for believing that Congress, at any time when it originally enacted those statutes or subsequently amended them, contemplated that the Secretary of the Interior's selection of OCS tracts for leasing would in any respect be influenced by state CZMA programs.

WOGA Br. at 20; *see also id.* at 32 n.25; DOI Br. at 20, 34 n.26.

[35]The House Oceanography Subcommittee alone "conducted nine oversight hearings, solicited testimony from some 300 groups and individuals, and received over 2,000 pages of testimony." H. R. Rep. No. 269, *supra*, n.32, at 12.

> must *continue* during the critical exploration, development, and production stages.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added).

> The [changes wrought in 1976] did not alter Federal agency [*i.e.*, § 307(c)(1)] responsibility to provide states with a consistency determination related *to OCS decisions which preceded issuance of leases. . . .*

H. R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added.)[26]

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[26]WOGA seeks to avoid the obvious impact of this House Report by arguing that the report "observed that the 1972 Act gave the States 'no part in any decision concerning development' " on the OCS. WOGA Br. at 43. WOGA's reading of the inner-quoted language is, however, obviously unsupportable in light of the House's clear statement only two pages later that § 307(c)(1)—passed as part of the 1972 Act—*does* apply to OCS lease sales. H. R. Rep. No. 1012 at 28. *See also* n.34, *supra*. Although the 1980 passage WOGA cites is hardly a model of clarity, a careful examination of the passage and its context demonstrates the error of WOGA's reading.

The immediate antecedent of the clause WOGA cites is not the 1972 CZMA, as WOGA implies, but rather this court's decision in *United States v. Maine*. The passage cited is therefore best understood as simply restating the holding of *Maine*: "the States [*ex proprio vigore*] would have no part in any decision concerning the development on the [OCS] nor would the States [*ex proprio vigore*] benefit from any lease bonuses or royalties." H. R. Rep. No. 1012 at 26-27. As is clear from the House Report at 28, the 1972 CZMA had already addressed the first prong of the *Maine* holding concerning coastal state participation in OCS decisionmaking by making certain coastal states with federally-approved plans federal agents delegated with power to implement a national policy of coastal zone protection. The 1972 Act had not, however, addressed the second prong of *Maine*—the issue of OCS royalties. The "problem" in *Maine's* wake, resolved by the 1976 CZMA Amendments and referred to in the 1980 House Report passage WOGA cites, *id.* at 26, is that coastal states would receive none of the proceeds of OCS royalties and thus had no funds to deal with the very real coastal impacts of offshore oil development. The House Report thus continues: "Under those

Embracing the 1971 "functional interrelationship" formulation, the House Report goes on to list the benefits of a liberal application of "directly affecting":

> First, it fosters consultation between Federal and State agencies at the earliest practicable time. This, in turn, enhances the ability of the States to plan for and manage the coastal zone effects which are directly linked to Federal activities. It also allows Federal agencies to avoid the irretrievable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved state programs. Secondly, broad opportunities for States to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary State participation in the national program. Finally, an expansive interpretation of the ["directly affecting"] threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act.

Id. at 34-35.[37]

1981: In 1981, the House Committee again reiterated its view by reporting out a resolution specifically dis-

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circumstances, efforts to amend the Coastal Zone Management Act of 1972 were initiated." The 1976 CZMA Amendments created a coastal energy facility impact program that provided funding to address this problem.

[37]Petitioner DOI cites a remark by Congressman Studds, Chairman of the House subcommittee, on the floor of the House but misrepresents its true significance. DOI Br. at 40. When Congressman Studds was questioned about the language of the 1980 report and replied that it was not intended to "modify the term directly affecting," he was simply restating the fact that the 1980 report was in perfect harmony with original congressional intent and every subsequent congressional declaration. 126 Cong. Rec. H.10111-12 (daily ed. Sept. 30, 1980). Our reading is supported by Congressman Studds' written comments the following year, which are found at H.R. Rep. No. 269, *supra*, n.32, at 11-15.

approving a NOAA regulation defining "directly affecting" in a narrow and technical manner—indeed, "in a way more nearly consistent with, if not identical to, that urged" by petitioners.[38] DOI Pet. at 17a. A resolution of disapproval was also introduced in the Senate but both resolutions were mooted when NOAA withdrew the offensive regulation. 47 Fed. Reg. 4231 (1982).

The CZMA thus offers a decade of consistent and convincing legislative history. Year after year, Congress has affirmed and reaffirmed its intention that "directly affecting" be broadly construed and, more specifically, that § 307(c)(1) be applied to DOI's OCS lease sales and prelease activities.

D. The Decisions of the Lower Courts in No Way Conflict with, but Are in Fact Strongly Supported by, the Legislative History of the OCSLA

Ultimately, it is ironic that petitioners persist in their effort to read the CZMA through the lens of the OCSLA instead of looking properly to the CZMA first to understand the scheme of cooperative federalism the statute at issue establishes. For despite the fact that the OCSLA is not the correct source to consult in the first instance for the proper construction of § 307(c)(1), it is evident that the legislative history of the OCSLA offers additional support for the decisions of the lower courts. Indeed, some of the clearest statements of DOI's obligation to render a § 307(c)(1) consistency determination at the OCS lease sale stage appear in OCSLA legislative history.[39]

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[38] *See* H.R. Rep. No. 269, *supra*, n.32, at 6.

[39] As early as 1975, the applicability of § 307(c)(1) to OCS leasing was understood by the Senate Committee on Interior and Insular Affairs. In its 1975 Report, the Committee indicated that it "had the benefit of" the Commerce Committee print, "Outer Continental Shelf Oil and Gas Development and the Coastal Zone"—a print that, as discussed *supra* at 28-29, affirms that DOI's OCS-related activites are governed by the CZMA consistency requirement for "Federal activities . . . that affect a state's coastal zone," *i.e.*, § 307(c)(1). *See* S. Rep. No. 284, 94th Cong., 1st Sess. 23 (1975).

In March 1976, the House Ad Hoc Select Committee on the Outer Continental Shelf released a committee print which had been prepared pursuant to the request of Chairman John Murphy. This committee print unequivocally affirms CZMA's applicability to OCS development: The 1972 CZMA is referred to as "major legislation with a *major* impact on OCS development." "Effects," *supra*, n.32, at 8 (emphasis added). Pointing out that the OCSLA "does not stand alone in administering the OCS, [but] must be read in conjunction with other laws," the document notes the application of § 307(c)(1) to the OCS, quoting its language, and notes:

> Although at the present time there are no approved management programs, if and when such programs are approved, OCS leasing and the resulting activity *will* need to be reconsidered in light of the State's efforts to manage their coastal margins under their approved programs.

Id. at 93 (emphasis added). A later passage explains:

> The [CZMA] requires a reordering of the Federal role to respond to the State guidelines rather than transmitting guidelines from Washington. . . . OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 228-29.[40]

Two months later, the House Committee released its report on OCSLA amendments. The report specifically cites the CZMA as a statute having "application to OCS areas and operations," H.R. Rep. No. 1084, 94th Cong., 2d Sess. 51 (1976), and goes on to list the "OCS-related responsibilities," of the Commerce Department as follows:

> The Coastal Zone Management Act of 1972 authorizes the Secretary of Commerce to provide grants-in-aid

[40]Moreover, the print devotes an entire appendix to a catalogue of provisions of the California Coastal Plan (then pending federal approval) that might be applicable to the OCS. *See id.*, Appendix XXIII.

> to coastal states to encourage the establishment of management programs for uses of land and water in coastal areas, *and to require consistency of federal programs with approved state plans.*

Id. at 52 (emphasis added).

In 1977, the Murphy Committee released another print that further illuminates the Committee's understanding of the relationship between the CZMA consistency provisions and OCS lease sales. The language of the print is crystalline:

> Under the 1972 Act, OCS leasing must be conducted in a manner which is "to the maximum extent practicable" consistent with approved State management plans. Under 1976 amendments to the Act, exploration and development permits are subject to a limited veto by the States as explained below.
>
> Much of the confusion about Federal consistency stems from the fact that there are two standards of consistency provided for in the CZM Act. The first standard of consistency *does* apply to leasing, but it is the less strict of the two standards. Section 307(c)(1) and (2) provide that Federal agencies will conduct or support activities and development projects which will effect [sic] the coastal zone in a manner which is consistent with State CZM programs "to the maximum extent practicable." The Federal agency itself decides whether or not its activities are consistent with state programs.

"Offshore Oil," *supra*, n.32, at 155 (emphasis in original).

The 1977 House Report on OCSLA Amendments echoes the view of its earlier committee prints; indeed, the prominent favorable citations of the two above-quoted prints virtually incorporate them by reference into the Committee Report. *See, e.g.*, H.R. Rep. No. 590, 95th Cong., 1st Sess. 55 n.l., 57 n.10, 58 n.22, 74 n.27. The Report specifically notes the relevance for the OCS of the CZMA requirement "for consistency of federal *programs* with approved

plans." *Id.* at 58 (emphasis added). In discussing Subsection 18(f) of the proposed OCSLA Amendments, the Committee indicated its belief that the "consistency requirement established pursuant to the Coastal Zone Management Act of 1972" would constrain DOI; since CZMA § 307(c)(3)(B) addresses private applicants, this discussion can only refer to § 307(c)(1). Finally, and most important, the Committee affirmed in no uncertain terms its awareness—an awareness doubly confirmed by the earlier committee prints—that, under the CZMA, "certain OCS activities, *including lease sales* and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce." *Id.* at 153 n.52 (emphasis added). The Committee went on to stress that nothing in the proposed OCSLA Amendments "is intended to alter procedures under [the CZMA] for consistency once a State has an approved Coastal Zone Management Plan." *Id.* This intention, of course, was formalized in the OCSLA savings clause, 43 U.S.C. § 1866(a).

In the end, the combined legislative histories of the CZMA and OCSLA present a compelling pattern of congressional pronouncements supporting the decisions of the lower courts. Congress has spoken not once or twice, but time and time again. Each time, its words confirm the correctness of the lower courts' holdings.

The legislative history we present is entitled to substantial weight. Not only is it entirely consistent with the language, purposes, and policies of the CZMA, but it also represents a consistent series of congressional declarations regarding the very issue in this case: the applicability of § 307(c)(1) to DOI's OCS lease sales. The earlier declarations are noteworthy because they emerged from committees with CZMA and OCSLA oversight engaged in enacting or amending legislation related to the consistency provisions of the CZMA. Later declarations are entitled to significant weight because they illuminate, confirm, and

clarify original intent,"[11] and were rendered in the context of a comprehensive review of the CZMA with specific awareness of the disagreement between DOI and coastal states over the meaning of § 307(c)(1). Moreover, when added to NOAA's interpretation of the consistency requirements of § 307(c)(1) (to which we turn next), these later declarations have given rise to substantial reliance by coastal states considering voluntary participation in the CZMA program.

E. The District Court's Holding Is Supported by the National Oceanic and Atmospheric Administration's Longstanding Interpretation of Section 307(c)(1)

It is a settled principle that an agency's interpretation of a statute that it is assigned by Congress to implement is normally entitled to deference from the courts. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975). The National Oceanic and Atmospheric Administration is the agency within the Department of Commerce charged with the responsibility for promulgating regulations under the CZMA. NOAA's longstanding interpretation of § 307 (c)(1) is that the Secretary of the Interior's lease sale decisions do directly affect the coastal zone and thus require a consistency determination.

In 1977, in its proposed rules on the § 307 federal consistency requirements, NOAA stated:

> NOAA is considering a position which treats the Department of the Interior's *pre-lease sale decisions, such as tract selections and choice of lease stipulations,* as a 'Federal activity' subject to the requirements of Section 307(c)(1) of the Act . . . This proposal would re-

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[11] "To the extent the 1971 and 1972 legislative history is slender and not dispositive of the issues in this case, subsequent legislative history can offer this Court an invaluable aid in its search for legislative intent. Since no state had an approved coastal plan until 1977, later congressional pronouncements may well be more focused than early ones. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n. 8 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Bell v. New Jersey*, 103 S. Ct. 2187, 2194 (1983).

> quire the Secretary of the Interior to initiate such decisions in a manner consistent to the maximum extent practicable with approved coastal management programs when those decisions would directly affect the coastal zone.

42 Fed. Reg. 43591 (1977) (emphasis added). NOAA's test under the various consistency subsections—§ 307 (c)(1), (c)(2), and (c)(3)—was "significance." *Id.* at 43590.

In 1978, NOAA finalized the rules and stated that the legislative history on consistency demonstrated that § 307 (c)(1) (as well as (c)(2) and (c)(3)) was intended to apply to "all Federal actions which were capable of significantly 'affecting the coastal zone.' " 43 Fed. Reg. 10511 (1978).

In 1979, the Department of Justice took issue with NOAA's conclusion that the same test could be applied to different subsections of § 307. April 20, 1979, Department of Justice Opinion Letter, J. A. 46, Cal. Exh. L-15. However, the Justice Department expressly agreed with NOAA that DOI's pre-leasing activities are subject to the consistency requirements of § 307(c)(1). *Id.* at 42-43.

In response to the Justice Opinion, NOAA deleted the definition of "directly affecting" as "significantly affecting" in its final 1979 regulations. 44 Fed. Reg. 37142 (1979). However, it reiterated the view, confirmed by the Justice Department, that:

> Accordingly, ***section 307(c)(1) of the CZMA applies to DOI's OCS prelease sale activities directly affecting the coastal zone.*** . . . Implementation of this requirement at the OCS prelease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts, thereby reducing conflicts with affected States and avoiding delay in the exploitation of offshore energy resources.

44 Fed. Reg. 37142 (1979) (emphasis added); *see also* 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

NOAA's regulations stress liberal construction of the threshold test to favor inclusion of federal actions subject

to consistency review. 44 Fed. Reg. 37143; *see also* 15 C.F.R. § 930.34(b). Moreover, the regulations state that federal activities which involve the "disposal of land or water resources" are specifically included within the consistency provisions of § 307(c)(1). 15 C.F.R. § 930.31(b).

In a March 23, 1979 memorandum entitled "Application of CZMA Section 307(c)(1) Consistency Requirement to Interior's Pre-Lease Sale Activities," J.A. 48-62, Cal. Exh. L-14, NOAA stated that the principles of statutory construction demonstrate that DOI's position is incorrect and that § 307(c)(1) does apply to Interior's pre-lease sale activities. The memorandum states that "the agency responsible for implementation of the CZMA, NOAA, has, in fact pointedly continued to assert the clear applicability of the statutory language." *Id.* at 58. In addition, the memorandum explicitly supports application of § 307(c)(1) to Interior's tract selection and lease stipulation decisions. *Id.* at 60-62.

This view was reiterated on April 9, 1980, when NOAA stated:

> In our view *Federal consistency requirements subject final notice of OCS sales to consistency determinations.* The critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will invariably affect coastal resources.

April 9, 1980 NOAA Letter to State Coastal Management Program Directors, C.R. 3, Cal. Exh. L-16 (emphasis added).

NOAA's longstanding interpretation obviously supports the application of § 307(c)(1) to the Secretary's OCS lease sales.[42]

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[42] For a brief time in 1981, NOAA changed its interpretation. However, adverse reaction from Congress and the coastal states led NOAA to reject the Interior Department's approach—the same approach pressed by the Secretary in this case. *See* DOI Pet. at 17a-18a, 57a-58a. This short-lived narrow definition is entitled to no weight. *Id.* at 18a, 57a-58a.

IV

LEASE SALE 53 AS PROPOSED WOULD DIRECTLY AFFECT THE COASTAL ZONE OF CALIFORNIA, AND, THUS, THE DEPARTMENT OF THE INTERIOR MUST COMPLY WITH THE REQUIREMENTS OF § 307(c)(1) PRIOR TO THE SALE OF LEASES

In the foregoing, we have established the clear intent of Congress in enacting § 307(c)(1) of the CZMA that this section apply to DOI's proposed OCS oil and gas lease sales. All that remains to be demonstrated is that the particular lease sale in question, Lease Sale 53, directly affects California's coastal zone, that is, that the lease sale initiates a series of events that have consequences in the coastal zone or, to use the alternative formulation, that it has a functional interrelationship with lands and waters in the coastal zone from an economic, geographic, or social standpoint. DOI Pet. at 15a. As will be shown, Lease Sale 53 plainly meets these definitions; therefore, DOI must comply fully with the requirements of § 307(c)(1) and its implementing regulations in order to fulfill Congress' intent. To postpone application of consistency requirements to the later exploration and development-production phases of the OCS oil and gas process, as DOI and WOGA suggest, would deny states the opportunity ever to review the conformity of the lease sale in its entirety with the state's federally-approved coastal program and thereby would greatly undermine the scheme of cooperative federalism Congress envisioned in enacting the CZMA. DOI Br. at 28-30, 41-49; WOGA Br. at 21-32.

A. Lease Sale 53 Directly Affects the California Coastal Zone

The courts below canvassed the direct effects of Lease Sale 53 on the coastal zone of California with great clarity. Judge Sneed, writing for the unanimous Ninth Circuit panel, discussed those effects as follows:

> We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease

> Sale 53 on California's coastal zone are detailed by the district court. We need not repeat them here. It is enough to point out that *decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production.* Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction.
>
> Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

DOI Pet. at 12a-13a (emphasis added; citations omitted). As noted by the appellate court, the District Court provided a lengthy, though scarcely exhaustive, list of specific direct effects of Lease Sale 53 on the California coastal zone. DOI Pet. at 62a-65a; *see also id.* at 45a-46a.

The lower courts' assessments are obviously correct. The decisions made in anticipation of Lease Sale 53 do establish "the scope and charter" for all subsequent oil and gas activities on the tracts offered. As Lease Sale 53 is a frontier OCS sale, the pre-leasing decisions demarcated

the area newly to be opened to petroleum development and, consequently, determined the particular expanse of the California coast that could be affected by the sale. The tracts in controversy are in close proximity to California's coastal zone, beginning just beyond the three-mile marine limit of that zone. DOI Pet. at 39a. The stipulations that will attach to leases and control numerous of the lessees' activities throughout the life of those leases were formulated prior to the proposed sale date. Final Environmental Impact Statement for Lease Sale 53, C.R. 19, DOI Exh. L-B at 1-40. It is difficult to imagine federal activities that more clearly have a direct effect on the California coastal zone than these pre-leasing decisions by DOI.

B. It Is Both Logical and Necessary To Conduct a Consistency Determination Pursuant to § 307(c)(1) at the Lease Sale Stage

Despite the abundance of identifiable direct effects of Lease Sale 53 on California's coast, the petitioners attempt to portray the performance of a consistency determination at the lease sale stage as an impossible exercise because of the lack of specific information at that stage and therefore urge that consistency requirements cannot attach to OCS oil and gas operations until the exploration and development-production phases.[43] DOI Br. at 28-30; WOGA Br. at 27-31. However, as we have previously seen, Congress contemplated that the provisions of § 307(c)(1)

[43] In its Statement of the Case, WOGA also attempts to portray California's coastal management program as too vague to provide the basis for a finding of inconsistency at the leasing stage of Lease Sale 53. WOGA Br. at 7-10. WOGA's characterization conveniently glosses over DOI's failure to provide a consistency determination canvassing the numerous relevant provisions of the California Coastal Management Program, which would have allowed the California Coastal Commission a formal opportunity to respond and state its disagreements based on its interpretations of the provisions of the Program. 15 C.F.R. §§ 930.41-42. Rather, WOGA dwells upon the Commission's citation of two provisions of the Program in an

would apply at the lease sale stage. A common sense appraisal of what a consistency determination can accomplish at that stage, as opposed to consistency certifications of individual lessees' exploration or development-production plans at those later stages, underscores the logic of Congress' application of § 307(c)(1) to lease sales.

Only if the provisions of § 307(c)(1) are applied to DOI at the lease sale stage will *DOI's activity as a whole* ever be adequately measured against the provisions of affected coastal states' management programs. The consistency provisions of § 307(c)(3)(B), which the petitioners claim obviate the need for (c)(1) applicability at the lease sale stage, simply cannot perform this function, as is apparent from the very terms of that subsection.

First, § 307(c)(3)(B) applies not to the activities of DOI but to those of the lessee. Thus, under § 307(c)(3)(B), such critical actions by DOI as the choice of tracts to be offered and the formulation of standard lease stipulations cannot be examined directly by the state at the outset of the leasing process but only tangentially as these decisions are reflected in individual lessees' actions.

Further, the exploration and development-production plans to which § 307(c)(3)(B) applies, and the consistency certifications that must accompany them, are submitted individually by the various lessees at different times throughout the lease terms." Were § 307(c)(3)(B) the sole

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ad hoc resolution in protest of DOI's refusal to perform a consistency determination as evidence of the Program's vagueness. This resolution certainly does not represent any final finding or interpretation by the Coastal Commission of the extent to which, and the manner in which, Lease Sale 53 may be inconsistent with the California program. That must await the DOI's consistency determination.

"The Affidavit of Mari Gottdiener, California Coastal Commission, July 1, 1981, and Exhibits 1 and 2 thereto, J.A. 152-55, illustrate well the sporadic filing of consistency certifications by lessees for proposed exploration and development-production plans. These documents reveal that intermittently over a two-and-a-half year

means of consistency review, generic problems with a particular lease sale vis-a-vis the state's coastal program could only be dealt with on a tract-by-tract basis. Such an approach would be inefficient,[45] as well as unfair to the lessee, who should not have to bear the burden of addressing consistency problems that result from generic decisions by DOI. Such problems should be ironed out between DOI and the state coastal management agency at the outset.

Finally, consistency review on the piecemeal basis provided by § 307(c)(3)(B) would effectively preclude states from ever meaningfully evaluating and responding to the cumulative impacts of DOI's OCS lease sales on their coastal zones. While activities on any single tract might not be inconsistent with the terms of the state's management program, the aggregate effects of such activities on a number of tracts in a particular region could be wholly inconsistent with that program. Only by examining the sale as a whole pursuant to § 307(c)(1) can its cumulative impacts be adequately assessed.

Thus, there is no merit to petitioners' related arguments that the phased nature of OCS decisionmaking under the OCSLA eliminates the need for a consistency determination at the lease sale stage. DOI Br. at 27-30; WOGA Br. at 21-32. As we have just shown, logic supports the application of the § 307(c)(1) consistency requirements to DOI at the lease sale stage so that generic and cumulative inconsistencies of a proposed sale with a state's CZMA program can be avoided by the federal agency itself at the outset.

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period, twenty-seven consistency certifications for such plans for tracts in the Santa Barbara Channel were submitted to the California Coastal Commission for its concurrence.

[45] While petitioners give lip service to avoidance of judicial diseconomies, DOI Pet. at 18-20; WOGA Br. at 45-46, their suggestions that § 307's consistency requirements are not to be applied until the exploration and development-production phases are to the contrary. Litigation over consistency is hardly likely to decrease if all consistency problems, generic as well as particular, must be resolved on a tract-by-tract basis.

As the D.C. Circuit has recognized, the OCSLA process is "pyramidic in structure," proceeding by stages from broad national planning to specific lease sale planning to the peculiarities of individual exploration and development-production plans. *California v. Watt*, 668 F.2d 1290, 1297 (D.C. 1981). The mere fact that more concrete information will be available in the final phases involving approval of lessees' tract-specific plans does not render an examination at the outset of the overall consistency of a lease sale proposal with the adjacent state's coastal management program premature or unnecessary. The very fact that DOI can make decisions on which tracts to offer and what lease stipulations to apply based on the information available at the pre-lease phase belies any assertion that there is insufficient information at that stage to address a state's sale-wide consistency concerns. The pyramidic structure of the leasing program militates in favor of application of consistency requirements at the lease sale stage: As the pyramid narrows in later phases, opportunities to address broad issues will have been lost.

The petitioners' citations to other statutory schemes as applied to OCS leasing are not to the contrary.[46] *County*

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[46]Nor are the provisions of the 1978 OCLA Amendments that allow a degree of secretarial control over OCS leases after their issuance at all indicative of a congressional intent that § 307(c)(1) not apply to OCS lease sales. DOI Br. at 30; *see also* WOGA Br. at 27-31. First, applying as they do to individual leases, these provisions are not designed to address the cumulative and generic problems of an entire lease sale. 43 U.S.C. §§ 1334(a), 1340(c), 1351(h). Second, the standards for lease suspension and especially cancellation are high, requiring in the latter case findings that "serious harm or damage" to life, the environment, or one of several other interests is likely, that this threat will not "decrease to an acceptable extent within a reasonable period of time," and that "the advantages of cancellation outweigh the advantages of continuing" the lease or permit in question. 43 U.S.C. § 1334(a)(2)(A). Meeting states' general consistency problems with a lease sale through a lease-by-lease application of these provisions would, to say the least, be a cumbersome process. Finally, if a lease is cancelled, in many

of Suffolk v. Department of the Interior, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), while holding that consideration under the National Environmental Policy Act of specific pipeline routes from OCS lease sites could be deferred until more information was available at later stages, also held that NEPA fully applied at the lease sale stage. Further, the court allowed the deferral of consideration of the pipeline routes until later stages because it found that the agency would still have full discretion to consider that issue and, if appropriate, reverse its actions at those later stages. Here, due to the pyramidic structure of OCS leasing, basic decisions by DOI at the lease sale stage, such as choice of lease stipulations and tract selection, cannot easily be undone at later stages.[47]

Nor does judicial interpretation of the Endangered Species Act support petitioners' argument for deferral of application of the CZMA consistency provisions to later phases of Lease Sale 53. While in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), the court would not enjoin a lease sale because of the possibility of jeopardy to an endangered species at later phases of the OCS leasing process, it so determined because the ESA had properly been applied to the lease sale stage and a finding of no jeopardy at that stage had been made by the relevant federal agency.[48] *Id.* at 607-610. Further, the court found

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circumstances the lessee will be entitled to compensation, a further impediment to use of the cancellation provisions to deal with generic problems. 43 U.S.C. § 1351(h)(2)(C).

[47] *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), is also cited by DOI in support of its theory that NEPA (and by analogy, CZMA) application can be deferred to later stages of the OCS process. DOI Br. at 29 n. 22. That opinion, which examined whether an impact statement on a lease sale was sufficiently detailed, offers no support for the proposition for which DOI cites it.

[48] DOI also suggests that, since the ESA would not prevent Lease Sale 53 from going forward although activities in later phases might jeopardize an endangered species, neither could California's con-

that specific lease stipulations had been imposed to ensure the species' freedom from jeopardy. *Id.* at 610. In other words, the requirements of the ESA were not avoided at the lease sale stage, which is of course exactly what DOI wishes to do here as regards the requirements of the CZMA. Instead, the court in *North Slope Borough* found that ESA concerns had been properly identified and addressed. DOI here owes no lesser duty to California as regards CZMA concerns.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court affirm those portions of the Ninth Circuit's and District Court's decisions that the Department of the Interior has petitioned this Court to review.

Respectfully submitted,

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cerns about the consequences of Lease Sale 53 upon the sea otter affect the conduct of the sale under the CZMA. DOI Br. at 46-47 n. 43. This argument ignores the fact that the provisions of the California Coastal Management Program are not identical to those of the ESA and, thus, that some degree of harm to the sea otter short of the likelihood of jeopardy to the survival of the species that triggers the ESA might be inconsistent with those provisions.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1326

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we demonstrated that Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1456(c)(1), does not impose consistency limitations on OCS lease sales based upon the hypothetical effects of possible exploration, development and production activities.[1] We showed that, by limiting the application of Section 307(c)(1) to activities "directly affecting the coastal zone," Congress plainly provided that only those federal activities that have some immediate, identifiable impact on the coastal zone would trigger the substantive consistency

[1] The following abbreviations will be used in this brief. State Br. refers to the Brief for the State of California as respondent in Nos. 82-1326 and 82-1327. Humb. Br. refers to the Brief for the Respondents Humboldt County, et al. in Nos. 82-1326 and 82-1327. NRDC Br. refers to the Brief for the Respondents Natural Resources Defense Council, et al. in Nos. 82-1326 and 82-1327. CSO Br. refers to the amicus curiae brief filed by the Coastal States Organization. Alaska Br. and New Jersey Br. refer to the briefs submitted, amicus curiae, by those states.

requirements of the CZMA (82-1326 Pet. Br. 20-27).[2] We further established that Congress has carefully integrated the provisions of the CZMA with the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. V) 1331 *et seq.*, and has specifically rejected the imposition of consistency limitations at the lease sale stage of the OCS process based upon the potential effects of future exploration, development and production activities (82-1326 Pet. Br. 27-35). Finally, we showed that the underlying purpose of the consistency requirements of the CZMA cannot be served by imposing consistency limitations at the lease sale stage because available information is insufficient to determine, in a meaningful way, whether future exploration, development and production activities will, in fact, be consistent with a state's coastal zone management program (82-1326 Pet. Br. 41-49).

The numerous respondents and amici have raised two principal objections to the government's submission. First, they argue that it is only "logical" to assume that Congress imposed a consistency limitation at the lease sale stage of the OCS process (CSO Br. 14, 27-28; NRDC Br. 48; see also Humb. Br. 13), and conclude that, since Congress explicitly rejected such a requirement under the provisions of Section 307(c)(3), the consistency requirement must be located in Section 307(c)(1). Second, they assert that certain policy goals would be furthered by consistency "review" of OCS lease sales, even though the underlying substantive goals of the CZMA admittedly cannot be fulfilled at this stage of the OCS process (CSO Br. 18; State Br. 40-41).

Contrary to the apparent thrust of respondents' arguments, however, the federal government is not obliged to produce explicit congressional language expressly "ruling out" the consistency requirement sought by respondents. Rather, the issue is whether the statutory language chosen

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[2] The State claims that the definition of "direct effects" proferred by the federal petitioners does not constitute the "plain meaning" of Section 307(c)(1) because it limits the application of the statute to physical effects (State Br. 22). What the State ignores is that Congress defined the coastal zone in physical terms, not in economic, sociological or psychological terms. See 16 U.S.C. 1453(1).

by Congress in 1972 and 1976, as explained by its contemporaneous legislative history, can fairly be interpreted as creating such a requirement. Nor should respondents' optimistic descriptions of the benefits to be derived from this proposed consistency "review" of all OCS lease sales—*i.e.*, intergovernmental coordination, information sharing, and comprehensive planning—divert this Court from focusing upon what is ultimately at stake in this litigation.

Despite respondents' repeated appeals to notions of wise procedure, they do not, and could not, take issue with the fact that the CZMA is not another procedural, decision-informing requirement. It is, instead, a substantive limitation on federal activity, and the procedural benefits postulated by the respondents and the amici are largely duplicative of the provisions of NEPA and the OCSLA. In the OCS lease sale context, moreover, there is no readily discernible means of determining when a proposed sale is, in fact, consistent "to the maximum extent practicable" with a state coastal management plan: applicable NOAA regulations provide no real guidance (82-1511 Fed. Cr. Res. Br. 19), the Ninth Circuit opinion recommends case-by-case determination (Pet. App. 22) and the respondents are unwilling even to discuss what standard would be both possible and meaningful (82-1511 Cr. Pet. Br. 22-27).

The decision of the court below unquestionably portends decades of case-by-case litigation to determine whether all the possible on-shore effects of each and every proposed OCS lease sale are consistent "to the maximum extent practicable" with approved state management plans. Such a result will drain both state and federal resources without, in the end, substantially furthering the underlying goal of Section 307(c)(1) of the CZMA—consistency. In these circumstances, the Court should return Section 307(c)(1) to its proper role by restoring the term "directly" to the statute, and placing the states' substantive authority to restrict OCS development where Congress intended: those stages where there is in fact available information on the basis of which meaningful decisions can be made.

I

In examining the legislative history relevant to this case, several considerations must be kept in mind. Initially, the

precise question presented here is not whether OCS oil and gas operations have general significance for the coastal zone. They do. Congress clearly made that determination in 1976 when it enacted Section 307(c)(3)(B), 16 U.S.C. 1456(c)(3)(B), which applies CZMA consistency requirement to the specific stages of the OCS oil and gas process.[3] Nor does this case concern whether Section 307(c)(1) of the CZMA "applies" to the pre-leasing activities of the Department of the Interior. It does. The federal government has repeatedly stated, throughout this litigation, that Section 307(c)(1) applies to the actions of the federal government performed in conjunction with a lease sale and to any actions by potential lessees that are immediately authorized by the issuance of the lease without a requirement for further federal approval. If any of these actions "directly affect" the coastal zone, a consistency determination will be prepared on those activities.[4] Finally, both the CZMA and the 1978 amendments to the OCSLA were controversial statutes that were debated in several sessions of Congress

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[3] Respondents' references to the portions of the CZMA that address the statute's application to "energy facilities" (CSO Br. 23; Humb. Br. 9) do not advance their case. The CZMA defines energy facilities as "equipment [facilities] used in exploration, development, production and transportation" of hydrocarbon resources. 16 U.S.C. 1453(6). Indeed, the statute defines "OCS energy activity" as "exploration, development and production" activity or "siting, construction, expansion or operation" of energy facilities. 16 U.S.C. 1453(13). Neither term refers to leasing, a pointed omission.

[4] If such activities are not found to "directly affect" the coastal zone, a negative determination is prepared pursuant to NOAA regulations. This procedure was followed in connection with OCS Lease Sale No. 53 (J.A. 66-72). As a practical matter, the activities of the federal government in preparing and conducting a lease sale, *i.e.*, information gathering and preparation of an environmental impact statement, do not normally have a direct effect on the coastal zone. Moreover, as we stated in our opening brief, the "preliminary" activities in which lessees may engage prior to approval of an exploration plan also generally have no physical effect on the coastal zone (82-1326 Pet. Br. 7). Respondents did not claim below and the lower courts did not rule that any of these activities "directly affected" the coastal zone. Amicus curiae Coastal States Organization's discussion of preliminary seismic testing (CSO Br. 15 n.8), therefore, is irrelevant to the issue properly before this Court.

before enactment. In the course of the legislative proceedings, suggestions were made and report language was drafted that represented positions ultimately rejected by Congress as a whole. For this reason, all legislative history must be read in the context of the terms of the final bills passed by Congress.

1. Perhaps the most egregious example of reading the legislative history of the CZMA out of context is the universal reliance of the respondents (State Br. 12, 15; Humb. Br. 25-26; NRDC Br. 25; CSO Br. 12) on a paragraph in a 1971 Senate Report which suggests that certain areas of the OCS that bear a "functional relationship" with the coastal zone "should be" managed in conformity with an adjacent state's approved coastal zone management program. This passage, the respondents' argue, reflects the meaning Congress intended when it adopted the term "directly affecting" the coastal zone a year later. While it is understandable that respondents rely on this paragraph, since it is the only reasonably contemporaneous legislative history that even remotely supports their position, this paragraph actually reflects a suggestion that was explicitly rejected by the Conference Committee in 1972.

The 1971 Senate Report, S. Rep. 92-526, 92d Cong., 1st Sess. 20 (1971), recognized that the pending definition of the coastal zone, which extended only to the outer limits of the three-mile territorial sea—where the coastal State owns the submerged lands and their resources—"would not support planning and implementation of a management program" in special areas of the OCS (such as channels or embayments) that have a functional interrelationship with the surrounding coastal zone because the CZMA, as then drafted, imposed consistency requirements only upon federal activities "in" the coastal zone. Nevertheless, the report suggested that these special areas of the OCS "should be" administered consistently with the state coastal management program. *Ibid.* Despite respondents' and the amici's evident enthusiasm over this passage, it is not as illuminating as it appears at first blush. In discussing the functional interrelationship of the coastal zone with the OCS, the Senate was concerned with specific, unusual

areas of the OCS that have special significance to state coastal waters; it was not concerned with federal activities on the OCS as a whole. And, even more importantly, the Senate bill to which this report was addressed contained no provision implementing the suggestion that functionally interrelated areas of the OCS should be administered consistently with an adjacent state's coastal zone management program. See S. Rep. 92-526, *supra*, at 3, 7, 30. At most, the report language reflects an idea held by the Senate Committee in 1971 that it was not willing to transform into binding law.

The bill passed by the House in 1972, however, did contain provisions that required the government to administer certain areas of the OCS consistently with approved coastal zone management programs. Section 313 of the House Bill, H.R. 14146, 94th Cong., 2d Sess. (1972); H.R. Rep. 92-1049, 94th Cong., 2d Sess. 7 (1972), directed the Secretary of Commerce to develop a management program for the OCS. The House Report states that, under this program "the Secretary shall, to the maximum extent practicable, apply the coastal zone program to waters immediately adjacent to the coastal waters of a State * * *." *Id.* at 23. At conference, this House provision was deleted from the bill because it would "create potential conflicts with legislation already in existence concerning Continental Shelf resources." H.R. Rep. 92-1544, 92d Cong., 2d Sess. 16 (1972).

The thrust of respondents' arguments, therefore, is that, by creating the term "directly affecting the coastal zone," the Conference Committee in 1972 intended, sub silentio, to implement the suggestion contained in the 1971 Senate Report concerning special areas of the OCS at the same time that it was explicitly rejecting a House provision that effectuated the sentiments expressed in that report. Such a submission is absurd. As stated in our opening brief (82-1326 Pet. Br. 23-24), the Conference Committee drafted the term "directly affecting the coastal zone" as part of a compromise between the Senate and House versions of the CZMA, which conflicted regarding the consistency obligations of the federal government for activities undertaken on

federal lands within the confines of the coastal zone.[5] Thus, the "directly affecting" language of Section 307(c)(1) was not drafted to expand the consistency obligations of the federal government, but rather was intended to limit the parameters of the Conference Committee's eventual compromise. 82-1326 Pet. Br. 23-24. Respondents' contrary conclusion does not arise out of any analysis of the legislative process that resulted in Section 307(c)(1), but instead rests on the bare fact that the 1971 Senate Report exists and the Conference Committee thereafter coined the "directly affecting" threshold.[6]

2. Respondents' quotations from committee reports prepared in 1975 and 1976 that support the application of consistency requirements to OCS leasing must also be read in context (State Br. 27; NRDC Br. 20-30). After all, until conference, the legislative proposal in 1976 was to amend Section 307(c)(3) to include the terms "lease" and "leasing" for the precise purpose of subjecting the issuance of OCS leases to CZMA consistency requirements. Not surprisingly, therefore, the committee reports contain language detailing the advantages of that approach. S. Rep. 94-277, 94th Cong., 1st Sess. 19-20 (1975); H.R. Rep. 94-878, 94th Cong., 2d Sess. 52-53 (1976). The ultimate outcome in 1976, however, was to reject such a requirement for OCS leasing. Instead, Congress amended Section 307(c)(3)(B) to create a phased, step-by-step consistency regime for OCS exploration, development, and production activities. Congress expressly concluded that application of CZMA consistency re-

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[5] The House bill would have required consistency for all federal activities on federal lands within the coastal zone, while the Senate bill would have exempted such activities from CZMA requirements. See 82-1326 Pet. Br. 23.

[6] We concede that, so long as a federal activity "directly affects" the coastal zone, the plain language of Section 307(c)(1) does subject federal activities on federal and submerged lands outside the coastal zone to CZMA consistency requirements. There is, however, no express appreciation of this point in the 1972 Conference Report and the State cannot manufacture such an awareness on the part of Congress by the simple expedient of including, in brackets, the term "including OCS lands" each time it discusses the Conference Report (State Br. 11, 12, 26). The bracketed phrase *does not* appear in the report.

quirements to the specific stages in the OCS process "will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans." S. Conf. Rep. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. 94-1298, 94th Cong., 2d Sess. 30 (1976).

3. Respondents next suggest that Congress in 1976 did not really reject a consistency requirement at the OCS leasing stage. Rather, they submit, Congress must have intended to shift the consistency requirement from the lease applicant under Section 307(c)(3) to the federal government under Section 307(c)(1) (see Humb. Br. 13). There is, of course, no textual evidence supporting such an argument in the 1976 legislative history. Moreover, that argument imputes to Congress a prescience of events that were not to occur for another year.

As we stated in our opening brief, throughout the 1976 legislative proceedings, no one suggested that Section 307(c)(1) applied to OCS lease sales (82-1326 Pet. Br. 33).[7] Instead, Congress debated whether the consistency requirements of Section 307(c)(3) were, or should be, applicable to OCS leasing. In September 1976, two months after the enactment of the CZMA amendments, NOAA issued proposed regulations implementing the consistency requirements of the amended statute. 41 Fed. Reg. 42878. Those proposed regulations did not suggest that an OCS lease sale was a "federal activity" within the meaning of Section 307(c)(1), did not contain an expansive definition of the term "directly affecting the coastal zone," and did not define "federal activity" in a manner that encompassed nonphysical governmental action. See 41 Fed.Reg. 42885 (1976).

All this changed the following year, however, when NOAA issued a new set of proposed regulations. As we explained in our opening brief, the agency in 1977 offered a definition of "directly affecting the coastal zone" that

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[7] Respondent NRDC does not prove otherwise by quoting report language that generally deals with the development of OCS resources (NRDC Br. 37). In fact, NRDC concedes that, in 1976, OCS leasing was thought to be subject to Section 307(c)(3), not Section 307(c)(1) (NRDC Br. 32-33 n.34).

equated "directly" with "significantly" (82-1326 Pet. Br. 35-36 & n.27). The proposed regulations also suggested, for the first time, that the term "federal activities" in Section 307(c)(1) should be defined as a "residual category" that covered all federal functions (including nonphysical actions such as rulemaking) not expressly addressed by other consistency sections of the CZMA. 42 Fed. Reg. 43585, 43597-43598 (1977). Against this definitional background, NOAA stated that it was "considering a position" that would include OCS lease sales as federal activities subject to Section 307(c)(1). 42 Fed. Reg. 43591 (1977). 82-1326 Br. 35-36 & n.28.[8]

Thus, the argument that Congress in 1976 intended to shift consistency obligations at the lease sale stage from potential lessees to the federal government rests upon an assumption that Congress silently anticipated a definitional revolution performed by NOAA a year later. As demonstrated in our opening brief, however (82-1326 Pet. Br. 32), the contemporaneous legislative history shows that Congress rejected imposing a consistency requirement on OCS lease sales because of the inadequate information that is available concerning OCS hydrocarbon resources and the activities that may be necessary for their extraction. This lack of knowledge is shared by the OCS lease applicant, the federal government, and the coastal states at the lease sale stage of the OCS process.[9]

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[8] The language quoted by NRDC (NRDC Br. 38) from the Ad Hoc Select Comm. on the Outer Continental Shelf, 95th Cong., 1st Sess., *A Study of Offshore Oil & Gas Development* 155-157 (Comm. Print 1977), is actually from a NOAA document reprinted in the appendix to that study. It reflects NOAA's position, adopted in 1977, that an OCS lease sale may be considered to be a "federal activity" within the meaning of Section 307(c)(1) because OCS leasing was excluded from Section 307(c)(3). However, the certainty with which that conclusion is expressed in this NOAA document is contradicted by the expressions of uncertainty concerning that legal position in the 1977 and 1978 Federal Register notices. 42 Fed. Reg. 43591; 43 Fed. Reg. 10510, 10523.

[9] Respondents argue that petitioners are relying upon the 1976 CZMA amendments as a "repeal by implication" (State Br. 31; NRDC Br. 32; CSO Br. 25). To the contrary, our argument is that Section 307(c)(1) never did impose consistency requirements based upon future

4. The respondents' treatment of the post-1976 legislative and administrative events is also disingenuous at best. In 1979, for example, the Department of Justice concluded that NOAA had the authority to declare that the Department of the Interior's preleasing activities were federal activities within the meaning of Section 307(c)(1). The Department, however, determined that the agency lacked the authority to dilute Section 307(c)(1)'s threshold test from "directly" to "significantly" (J.A. 45-47).[10] The State professes to accept the portion of the opinion that rejects the "significance" standard (State Br. 21 n.35). But, at the same time, it expressly adopts the list of so-called "direct" effects of OCS Lease Sale No. 53 created by the district court (Pet. App. 62a-65a; State Br. 48). This list was taken wholesale from the environmental impact statement (EIS) on OCS Lease Sale No. 53,[11] which was prepared under a standard of "significanc[e]" (42 U.S.C. 4332(2)(C)) and which addressed the indirect and cumulative effects of the proposed lease sale. See 40 C.F.R. 1508.25(c), 1502.16,

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exploration, development and production activities at the lease sale stage. Respondents' argument, however, may be fairly characterized as "amendment by implication." They claim that because Congress rejected including a consistency requirement on OCS leases when it amended Section 307(c)(3) in 1976, such a consistency requirement must be found in Section 307(c)(1), and the general terms of that provision, unchanged since its adoption in 1972, must now be interpreted to achieve that result, regardless of the original intent of Congress or the plain meaning of the statutory terms.

[10] The state suggests that the Department of Justice found that there were preleasing activities that directly affect the coastal zone for which consistency review at the exploration or development and production stages would come too late (State Br. 40 n.68). The State, however, pointedly omits the first part of the sentence quoted from the Department's opinion ("[I]t is well possible that * * *") (J.A. 43) as well as its conclusion ("[T]he question of whether those activities or any of them directly affect the Coastal Zone is essentially one of fact which the Department of Justice is not authorized to answer") (J.A. 47). There are, throughout the briefs filed by respondents, numerous instances of partial quotation. See also n. 6, *supra* and n.13 *infra*. They are too numerous to answer individually here. We trust that the Court will review all quoted materials in full and in context.

[11] The district court also drew upon the Secretarial Issue Document (SID). See 82-1326 Pet. Br. 11 & n.10.

1508.7 and 1508.8. Respondents simply cannot disclaim an intention to substitute "significantly" for the term "directly" as the threshold term in Section 307(c)(1) and then rely upon the cumulative and indirect effects that may flow from an OCS lease sale to establish that this threshold has been reached (NRDC Br. 47; State Br. 39).[12]

5. Respondents continue to cite language contained in 1980 Senate and House Reports as persuasive evidence of the 1972 congressional intent behind the term "directly affecting the coastal zone." At the same time, they fault the United States for relying on the minority views expressed in the 1981 House Report on the resolution of disapproval (State Br. 24). H.R. Rep. 97-269, 97th Cong., 1st Sess. 16 (1981). As we stated previously (82-1326 Pet. Reply Br. 8-9), the minority views are offered primarily to show that the reports relied upon by respondents and the lower courts cannot be deemed to be reliable expressions of "Congress," but are instead the views of the majority of the members that were sitting on the relevant committees in 1980. The 1980 reports and the 1981 majority views were challenged as inappropriate by members of Congress when they were issued[13] and should not have been accorded sub-

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[12] While most of the lower courts' construction of the CZMA consistency requirements is fairly specific to the OCSLA oil and gas lease sale context, their equation of the effects disclosed in an EIS with direct effects on the coastal zone within the meaning of Section 307(c)(1) may well influence the future construction of other federal statutes. The National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. V) 4321 *et seq.*, of course, is essentially a procedural statute (see *Strykers Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538 (1978)), and the regulations governing the preparation of environmental impact statements (40 C.F.R. Pt. 1500 *et seq.*) are designed to fulfill the informative, procedural nature of NEPA duties. If, however, the remote and speculative effects that may be described in an EIS are considered "direct effects" of a federal action for the purpose of applying the substantive limitations of Section 307(c)(1) of the CZMA, the expansive regulations governing NEPA compliance may have to be rethought.

[13] The State and NRDC attempt to paint the challenge to the 1980 House Report on the floor of the House as a reaffirmation rather than a denial of the language contained in the report (State Br. 17 n.29;

stantial weight in the lower courts (Pet. App. 15a). As this Court has previously stated:

> We are normally hesitant to attach much weight to comments made after the passage of legislation * * *. In view of the contradictory nature of these cited statements, we give them no weight at all.

County of Washington v. *Gunther*, 452 U.S. 161, 176 n.16 (1981). This treatment of post-enactment congressional statements is fully appropriate here.

6. Finally, the respondents chide the federal government for a lack of consistency in its position (NRDC Br. 26; State Br. 45). According to the NRDC, the federal government should have resisted application of the Section 307(c)(1) consistency requirements to any federal activity on the OCS. Unlike the respondents, however, the federal petitioners have felt constrained by the "plain meaning" rule of statutory construction in the absence of fairly conclusive contrary legislative history. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976). Moreover, the federal respondents have acquiesced in NOAA's interpretation of Section 307(c)(1) as a residual category for all federal functions not expressly subject to the other consistency provisions of the CZMA, and have cooperated with the states by reviewing the preleasing activities associated with each lease sale as well as the activities immediately authorized by the prospective leases to determine whether those activities "directly affect" the coastal zone and, if so, whether they are consistent, to the maximum extent practicable, with an approved coastal zone management program (J.A. 66-72). Therefore, to the extent that the

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NRDC Br. 35 n.37). The challenger on the floor of the House, however, was Representative McCloskey, who in 1981 voted against the resolution of disapproval and signed the statement of dissenting views. H.R. Rep. 97-269, *supra*, at 8, 19. Representative Studds, in response to the challenge, concluded that any question regarding the proper application of the "directly affecting" threshold of Section 307(c)(1) remains "essentially one of fact as the Justice Department has previously concluded." 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980). Thus, any reaffirmation contained in this colloquy is of the conclusions contained in the 1979 Department of Justice opinion, not the very different language in the 1980 reports.

phased, step-by-step, consistency regime expressly designed by Congress to apply to the OCS oil and gas process (16 U.S.C. 1456 (c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d) and 1351(h)(1)(B)) contained a regulatory gap at the lease sale stage, that gap has been filled. What the federal petitioners refuse to acquiesce in is a post-hoc interpretation of the general statutory language of Section 307(c)(1) that effectively amends the language enacted by Congress in 1972 and that compromises the entire structure of decisionmaking under the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA when such a result does not serve the purposes of the Coastal Zone Management Act in any meaningful way. See 82-1326 Pet. Br. 42-43.

II

Respondents suggest that consistency "review" at the OCS lease sale stage is good "policy" because it will further information sharing and consultation. But as we already detailed (82-1326 Pet. Br. 42), the immediate purpose of Section 307(c)(1) is not to provide coastal states with environmental information or the opportunity to participate in the initial planning stages of federal activities on the outer continental shelf. Those functions are filled by NEPA and the OCSLA not only at the lease sale stage, but even earlier. The CZMA is concerned with substantive results, not procedure. Indeed, with two exceptions, respondents do not even attempt to describe how the substantive limitation of Section 307(c)(1) can be integrated with OCS lease sale decisionmaking (CSO Br. 20; Humb. Br. 36-37). The respondents' reluctance to address this subject is telling because, upon analysis, the claimed benefits of lease sale stage consistency "review" evaporate.

Respondents assert that a consistency determination at the lease sale stage is necessary to permit comprehensive consideration of the cumulative impacts of OCS development (NRDC Br. 47; CSO Br. 16-17). They fail to mention, however, that the environmental impact statements prepared for OCS lease sales already undertake such an analysis, and they likewise ignore the substantive mandate of the CZMA. The CZMA does not require that the federal government "consider" the cumulative impact of its actions

directly affecting the coastal zone; it mandates that those activities be consistent to the maximum extent practicable with an approved coastal management plan. And, as noted earlier, the actual impact of future activities depends, not upon the contours of an individual lease sale, but rather upon whether commercial quantities of oil or gas are found, the type, quantity and location of the discoveries, and the technology available for their extraction. See 82-1326 Pet. Br. 28. Because even respondents concede that the actual impacts of later stage activities cannot be determined at the lease sale stage (State Br. 40-41), application of Section 307(c)(1) to an OCS lease sale "will almost inevitably result in an erroneous [consistency] decision" (82-1326 Pet. Br. 45-46).[14]

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[14] Congress mandated a phased system of decisionmaking for the OCS oil and gas process in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA to avoid the necessity of making premature decisions at the lease sale stage when "onshore and environmental impacts of production activit[ies]" are not yet known. H.R. Rep. 95-590, 95th Cong., 1st Sess. 164 (1977). This approach had wide ranging support—including that of the National Governors Council and various environmental groups. See *Outer Continental Shelf Lands Act Amendments and Coastal Zone Management Act Amendments: Joint Hearings on S. Res. 45 and S. Res. 222 Before the Senate Comm. on Interior and Insular Affairs and Commerce*, 94th Cong., 1st Sess. 3 (1975) (hereinafter cited as *Joint Hearings*). See also *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on S. 9 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 71, 500-501, 584 (1977). Indeed, the near universal understanding at the time that the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA were formulated was that the coastal impacts of the exploration, development and production stages of the OCS process could not be determined at the lease sale stage. This widespread understanding is illustrated by the following testimony before the Senate Committee on Interior and Insular Affairs in 1975 (*Joint Hearings* 1131):

> ***Senator Johnston:***
>
> **With respect to dismemberment of the decisions to explore and produce, * * *. What would be the reason why you would not produce, once you had explored.**
>
> ***Ms. Heller [Environmental Policy Center]:***
>
> **It seems to me there could be several. One is you could find, after exploration, that it is not worth it to develop the resource. That it is not a commercial find.**

Nor is it necessary to impose a consistency limitation at the lease sale stage to avoid eventual violation of a state coastal management program. Under the relevant provisions of the CZMA, 16 U.S.C. 1456(c)(3)(B), and the OCSLA, 43 U.S.C. (Supp. V) 1340(c)(2) and 1351(d), the states have the right to review and either approve or disapprove any exploration, development or production activities on the OCS before they occur. If the effects of any such activity, either alone or in conjunction with the impacts of other activities, violate a state management plan, the state has the right to disapprove the proposed activity. Therefore, while the individual lessees may not have the right to control each other's activities (CSO Br. 17), the state and federal governments unquestionably retain the right to review and control each lessee's activities in the context of all preexisting activities on the OCS.

In these circumstances, it is difficult to conceive a meaningful role for an inherently inaccurate and speculative consistency determination at the lease sale stage of the OCS oil and gas process. To the extent that a state desires information concerning the potential cumulative impacts of an OCS lease sale, that information is provided in the environmental impact statement prepared pursuant to NEPA. A consistency determination at the lease sale stage, moreover, will not obviate the necessity of studying the activities detailed in subsequent exploration, development and production plans to determine whether the incremental effects of the planned activities will result in the violation of a state coastal zone management program. The respondents, therefore, are reduced to suggesting that OCS lease sale consistency "review" would be beneficial in drafting lease

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* * * * *

There are other reasons, also. A State could say—could decide that the impacts were going to be much more than they could bear.

Senator Johnston:

Couldn't you make that decision in advance of exploration?

Ms. Heller:

I don't see how you can. How could you know what the impacts are going to be until you know what the extent of the resource is? The onshore impacts depend, to a great extent, on how much oil is actually out there.

stipulations and promoting intergovernmental coordination. The first proposition is entitled to little weight and the second ignores Congress' careful consideration of federal-state relations in drafting the OCSLA.

Respondents submit that an OCS lease sale consistency determination would permit the drafting of lease stipulations to insure consistency with state management programs (Humb. Br. 29; CSO Br. 16-17). But, because lease stipulations are contract terms, they cannot be changed at the will of the government. Unlike other administrative tools, such as regulations, operating orders and plan approval criteria, which can be modified unilaterally by the federal government as the OCS process unfolds (see 43 U.S.C. (Supp. V) 1334(a)), lease stipulations can be modified only by agreement of both parties. As a result, lease stipulations addressing exploration, development and production stage activities may restrict rather than expand the options available to the government at these stages of the OCS process, and should be included in an OCS lease only when the parties are confident that, under any eventuality, the terms of the stipulation will provide the appropriate standard.[15] Because of the uncertainty concerning future events at the time of lease sale, inclusion of specific stipulations to insure "consistency" could in fact thwart its attainment.[16]

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[15] The Secretary, for example, is charged with the duty to require lessees to use the "best available and safest technologies" ("BAST"). 43 U.S.C. (Supp. V) 1347(b). A stipulation specifying the use of certain equipment on an OCS lease (see Humb. Br. 32), therefore, could become inconsistent with the Secretary's BAST duties if available technology advances between the lease sale and development stages. See *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 719 (1st Cir. 1979) ("the statutory scheme providing for retroactive application of BAST regulations indicates that the Secretary's duty to develop the regulations is an ongoing process which allows for flexible, changing standards as the available technology evolves").

[16] An excellent example of this point arose in connection with OCS Sale No. 68 off southern California in 1981. The California coastal zone management program calls for subsea (*i.e.* underwater) completions of production wells in some areas to protect the aesthetic "viewscape," unless other types of completion are environmentally preferable.

The respondents' most prominent assertion is that a consistency determination affords an opportunity for federal-state cooperation and coordination. Indeed, the State of Alaska asserts that the consistency determinations prepared to date for sales off its coast have obviated litigation by providing an opportunity for consultation and agreement (Alaska Br. 10). Admittedly, the State of Alaska has not sought to enjoin recent lease sales[17] and the Secretary and the Governor of Alaska have been able to work out their disagreements. But this felicitous result cannot be attributed to the preparation of consistency determinations, because Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345—not Section 307(c)(1) of the CZMA—provided the procedures and authority utilized by the Secretary.[18]

Section 19 of the OCSLA, entitled "Coordination and consultation with affected State and local governments," grants the Governor of any affected state the formal opportunity to submit recommendations regarding the "size, tim-

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Cal. Pub. Res. Code § 30262(c) (West 1977). For Lease Sale No. 68, California requested that stipulations requiring subsea completions be placed into the leases on certain tracts, on the theory that this stipulation would make the sale of the tracts consistent with its management plan. Ironically, such a stipulation could render development of the leased tracts inconsistent in the future. Depending upon the resources found and technology then available (four to five years in the future), another completion method may be environmentally preferable. To avoid this contingency, the stipulation would have to have been drafted so that the government reserved the right to require, but did not mandate, subsea completions. Although such a stipulation could be drafted, those same rights are already reserved, without a stipulation (and without the risk of error inherent in a stipulation), by the very terms of the OCSLA and the CZMA. 43 U.S.C. (Supp. V) 1334(a), 1340(c), 1347(b) and 1351(h); 16 U.S.C. 1456(c)(3)(B).

[17] The local governments sue in Alaska, not the state. See *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980); *North Slope Borough* v. *Watt*, No. A82-421 (D. Alaska); *Association of Village Council Presidents* v. *Watt*, No. A83-150 (D. Alaska); *Village of Gambell* v. *Watt*, No. N83-003 (D. Alaska), appeal pending, . Nos. 83-3735, et al. (9th Cir.); *Village of False Pass* v. *Watt*, 565 F. Supp. 1123 (D. Alaska 1983), appeal pending, No. 83-3989 (9th Cir.)

[18] As the State itself declared in its brief (Alaska Br. 9), Alaska ceased suing to enjoin OCS lease sales long before the first consistency determination under Section 307(c)(1) was prepared.

ing or location" of an OCS lease sale. 43 U.S.C. (Supp. V) 1345(a). See 82-1326 Pet. Br. 6. In considering whether to accept these recommendations, the Secretary is required to provide the state with an "opportunity for consultation," (43 U.S.C. (Supp. V) 1345(c)), and is expressly authorized "to enter into cooperative agreements with affected States" for purposes consistent with the OCSLA (43 U.S.C. (Supp. V) 1345(e)). The cooperative agreements forged between the Secretary and the Governor of Alaska, therefore, did not flow from the consistency provisions of the CZMA but rather from the explicit statutory terms of the OCSLA.

Indeed, as the record in this case demonstrates (see 82-1326 Pet. Br. 9-14, 42 & n.34), Section 19 of the OCSLA provides the states with every accommodation—short of control or a veto power over OCS leasing—that they claim is necessary to protect their long-term coastal management interests. A governor's recommendation that incorporates, or is based upon, possible consistency concerns during the later stages of the OCS process must be considered by the Secretary and accepted if he determines that the recommendation provides a reasonable balance between the national interest and the well-being of the citizens of the state. 43 U.S.C. (Supp. V) 1345(c).[19] Accordingly, to the extent that the states merely desire input and federal-state coordination regarding particular OCS lease sales, Section 19 provides the appropriate mechanism, and a lease sale consistency determination is plainly unnecessary. See Humb. Br. 38; State Br. 37 (discussing Secretary Andrus' accommodation of state concerns during OCS Lease Sale No. 48).

In the end, respondents rest upon the simple postulate that, because OCS lease sale decisions are of potential significance for the coastal zone, there must be a substantive

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[19] The considerations that may be raised in a governor's Section 19 recommendation extend beyond, but of course include, coastal zone management concerns. In practice, the governor's recommendations usually includes the position adopted by the state coastal zone management authorities. See, *e.g.*, *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 576, 579 (D. Mass. 1983), aff'd on other grounds, Nos. 83-1258, et al. (1st Cir. Sept. 16, 1983). See also J.A. 73-95.

CZMA limitation that can be imposed upon such decisions. But, the attempt to impose a substantive consistency limitation on OCS lease sales that is both meaningful and possible founders upon reality. Lease sale stage tract selection decisions, as respondents own descriptions show, are essentially informed judgment calls. See, *e.g.*, Humb. Br. 32-34. Some parties before this Court have nevertheless suggested that the Secretary should be required to determine, prior to issuing an OCS lease, that consistency at future stages of the OCS process is possible or at least is not precluded.[20] While respondents are certainly correct that the federal government is capable of producing such a determination at the lease sale stage, they err in concluding that such a document would be meaningful (CSO Br. 20). In fact, in *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 578 (D. Mass. 1983), aff'd on other grounds, Nos. 83-1258, et al. (1st Cir. Sept. 16, 1983), the district court, at the behest of one of the amici in this case, ruled that a consistency determination prepared under a similar standard was insufficient precisely because it failed to assure, in a meaningful way, that future exploration and development activities would indeed be consistent with the state's coastal zone management plan.[21]

As demonstrated by the cited case, a conclusion that future consistency is "possible" is not a meaningful substantive consistency determination. Conversely, because of the lack of information at the OCS lease sale stage, a truly meaningful consistency limitation cannot be imposed without compromising the phased system of OCS decisionmaking. Congress recognized these realities in 1972, 1976

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[20] CSO and County of Humboldt (CSO Br. 20; Humb. Br. 36-37). The remaining respondents and amici curiae remain silent as to an appropriate standard of consistency at the lease sale stage of the OCS process. They limit their remarks to a disclaimer of a "veto power" over OCS leasing. Even this concession, however, is coupled with an assertion that it is not a "state" veto because their coastal zone management program was approved by the Secretary of Commerce (State Br. 44). The federal government, however, never approved the 12-mile buffer zone California sought to impose in this case (J.A. 74).

[21] One of the signers of the CSO brief was the Attorney General of Massachusetts. We are unable to reconcile that state's position in *Conservation Law Foundation* v. *Watt*, *supra*, with the content of the CSO submission to this Court.

and 1978; we merely ask that its resolution of this conflict be confirmed.

For these reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

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Nos. 82-1326 and 82-1327

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, et al., Petitioners (in No. 82-1326)

and

WESTERN OIL AND GAS ASSOCIATION, et al., Petitioners (in No. 82-1327)

v.

STATE OF CALIFORNIA, et al., Respondents (in both Nos. 82-1326 and 82-1327)

BRIEF OF AMICUS CURIAE STATE OF ALASKA

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STATUTES:

Coastal Zone Management Act, P.L. 89-454, 16 U.S.C. § 1451 et seq., as amended. 1

Section 307(c)(1), 16. U.S.C. § 1456(c)(1) 5

MISCELLANEOUS:

Brochure, "The Coastline of the United States," published by the National Ocean Survey, National Oceanic and Atmospheric Administration, U.S. Department of Commerce 2

MISCELLANEOUS: (continued)

Fact Sheet on OCS Leasing Schedule, July 22, 1982, issued by the United States Department of the Interior, Alaska Outer Continental Shelf Region, Office of Public Affairs. 2

Federal 5-Year Oil and Gas Leasing Schedule, published at 46 Fed. Reg. 11983 (March 19, 1982). . . . 3

State of Alaska, Department of Community and Regional Affairs, map of Organized Borough and Cities, January 1983 4

INTEREST OF AMICUS CURIAE

Amicus curiae State of Alaska submits this brief in support of respondents State of California, et al. Alaska participated as an amicus in the proceedings below. Under Rule 36.4 of the Rules of the Supreme Court, the parties' written consent to the filing of an amicus curiae brief by the State of Alaska is not required.

The State of Alaska is one of the sovereign States of the United States of America. Alaska has adopted a coastal management program, approved by the federal government, as authorized by the Coastal Zone Management Act ("CZMA"), P.L. 89-454, 16 U.S.C. § 1451 et seq., as amended. Because of facts unique to Alaska, this Court's decision in this action may have greater significance for Alaska than any other coastal State.

Part of this significance is

due to Alaska's size and the tremendous length of Alaska's coastline. Alaska's coastline totals 6,640 miles, more than half of the 12,383 miles of United States coastline. By comparison, the Pacific coastline of the 48 contiguous States totals 1,293 miles, the Gulf of Mexico coastline totals 1,631 miles, and the Atlantic coastline totals 2,069 miles. 1/

Because of these facts, more federal outer continental shelf ("OCS") leasing will occur off Alaska's coast than off any other State. Of the 936 million total acres in all federal OCS planning areas, 557 million (or approximately 60%) are offshore Alaska. 2/

1/ See brochure "The Coastline of the United States," published by the National Ocean Survey, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

2/ See Fact Sheet on OCS Leasing

Since the federal OCS leasing program commenced in 1954, 10 of the 60 federal OCS sales have been offshore Alaska, all since 1976. 3/ Of the 32 federal OCS sales scheduled between now and 1987, 13 will be offshore Alaska. 4/

More Alaskans are employed by

Schedule, July 22, 1982, issued by the United States Department of the Interior, Alaska Outer Continental Shelf Region, Office of Public Affairs (reprinted as Exhibit A to this brief).

3/ The 10 sales were: (1) Northern Gulf of Alaska (Sale 39), April 1976; (2) Lower Cook Inlet (Sale CI), October 1977; (3) joint federal/State Beaufort Sea sale (Sale BF), December 1979; (4) Eastern Gulf of Alaska (Sale 55), October 1980; (5) Eastern Gulf of Alaska reoffering sale (RS-1), June 1981; (6) Lower Cook Inlet/Shelikof Strait (Sale 60), September 1981; (7) Lower Cook Inlet reoffering sale (RS-2), August 1982; (8) Diapir Field (Sale 71), October 1982; (9) Norton Sound (Sale 57), March 1983; and (10) Saint George Basin (Sale 70), April 1983.

4/ See Federal 5-Year Oil and Gas Leasing Schedule, published at 46 Fed. Reg. 11983 (March 19, 1982).

the commercial fishing industry than any other industry in the State. In addition, tourism and subsistence fishing are extremely important. Because of the relative lack of road systems in Alaska, most Alaska communities have built up along the coast.

At the same time, Alaska has little or no local coastal infrastructure to accommodate and mitigate the effects of offshore development. Substantially less than one-third of Alaska's coast is within an organized local government unit, and almost all of that is concentrated in two areas, the North Slope and the Cook Inlet/Kodiak area. 5/

As a result, Alaska's federally

5/ See State of Alaska, Department of Community and Regional Affairs, map of Organized Boroughs and Cities, January 1983.

approved coastal management program is virtually the only legal mechanism available to the State and to many local areas of Alaska's coast for influencing and mitigating both offshore and onshore impacts of federal OCS leasing activity. Alaska accordingly has a very direct interest in the outcome of this case, an interest as great or greater than any other coastal State.

SUMMARY OF ARGUMENT

Contrary to petitioners' assertions, Alaska's experience with federal OCS leasing demonstrates that CZMA consistency review at the lease sale stage not only facilitates but is essential to furthering the national interest in full development of OCS energy resources consistent with federally approved State coastal management programs.

ARGUMENT

The question presented in this

action is whether federal OCS lease sales must be "consistent with approved state management programs" under Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1). 6/ On the substantive merits of that issue, the State of Alaska adopts and supports the position and analysis of respondents State of California, et al. and amicus curiae Coastal States Organization.

However, petitioners James G. Watt, Secretary of the Interior, et al.

6/ An ancillary question is presented in the cross-petition filed by cross-petitioners State of California, et al., in No. 82-1511: whether the Ninth Circuit erred in addressing the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1). Alaska joins the cross-petitioners and amicus curiae Coastal States Organization in urging this Court to hold that the gratuitous Ninth Circuit discussion of that phrase was premature and judicial construction of that phrase, if required, should await a proper case.

("federal petitioners"), and petitioners Western Oil and Gas Association, et al. ("WOGA"), assert that "if CZMA consistency review is imposed on the issuance of an OCS lease, the national interest in full development of energy resources on the outer continental shelf may be thwarted" 7/ and that "[a]pplication of the CZMA to OCS leasing in the manner envisioned below would erect substantial litigation impediments to the development of OCS energy resources, thus contravening the basic purpose of the 1978 OCSLA [Outer Continental Shelf Lands Act] amendments to permit the swift, orderly and efficient exploitation of the oil and gas resources of the OCS." 8/

Alaska's recent experience with

7/ Federal petitioners' Brief, p. 19.

8/ WOGA Brief, p. 17.

federal OCS leasing belies these assertions and demonstrates that they are unfounded. Indeed, the opposite is true: CZMA consistency review at the lease sale stage can materially advance the national interest, as expressed in both the OCSLA and the CZMA, in full development of OCS energy resources in a manner consistent with federally approved State coastal management programs.

As noted above 9/, there have been 10 federal OCS lease sales offshore Alaska since 1976. The State of Alaska brought suit with respect to only the first of those sales, the 1976 Northern Gulf of Alaska sale. See Alaska v. Andrus, 580 Fed.2d 465 (D.C. Circuit), vacated in part as moot, sub. nom. Western Oil and Gas Association v. Alaska,

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9/ See n. 3 supra.

439 U.S. 922 (1978).

Following that less than completely successful litigation experience, and because of the time, expense, and uncertainty of litigation, Alaska successfully has sought and reached agreement with the federal government regarding individual federal OCS lease sales with respect to both tract deletions and protective stipulations to minimize adverse environmental impacts. 10/ In

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10/ For example, in addition to tract deletions, the following stipulations have been included in one or more federal OCS lease sales offshore Alaska: (1) seasonal drilling restrictions precluding drilling during periods when the bowhead whale, an endangered species, migrates through sale areas; (2) a requirement that a drilling structure withstand two seasons of ice movement before drilling can be commenced; (3) protection for areas of historical and archaeological significance by requiring a survey and inventory of significant sites before activity commences; and (4) a requirement that the oil industry conduct educational programs for oil company workers

addition, under separate agreements with the Department of the Interior, Alaska's concurrence must be obtained before certain activities proposed by federal OCS lessees may begin. 11/

On the basis of these tract deletions, protective stipulations and separate agreements, the State of Alaska found the affected federal lease sales consistent with Alaska's federally

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regarding environmental concerns and community values, customs and lifestyles in rural coastal regions of Alaska.

11/ For example, the State has obtained concurrence authority with respect to: (1) oil spill contingency plans; (2) exploratory drilling and downhole activities during broken ice conditions (the most dangerous operating conditions in Alaska); (3) the discharge of waste waters as well as mud and cuttings into marine waters less than 10 meters deep; and (4) proposals to load oil onto tankers directly from production platforms instead of piping it ashore for loading from an onshore terminal facility.

approved coastal management program. As a result, the State of Alaska was not compelled to sue to enjoin the sales. The sales proceeded, as contemplated under the OCSLA, in a manner consistent with Alaska's coastal management program, as contemplated under the CZMA.

The point is that CZMA consistency review at the lease sale stage actually has facilitated federal OCS leasing in Alaska by ensuring that the leases issued were consistent with Alaska's federally approved coastal management program. The experience in Alaska demonstrates that such a review can occur without frustrating the national interest, as expressed in the OCSLA, in development of OCS energy resources.

More importantly, it demonstrates that the national interest in development of OCS energy resources can be advanced in a manner which is fully

compatible with the national interest, as expressed in the CZMA, "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 12/

Indeed, CZMA consistency review must be available at the lease sale stage since it is the lease -- i.e., the contractual agreement between the federal government and the oil company lessees -- which forms the basis for all of the companies' subsequent OCS activities. Particularly with respect to protective stipulations, such review at the lease sale stage reduces the likelihood of litigation at the subsequent exploration and development stages. Where such protective stipulations are included as

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12/ 16 U.S.C. § 1452(in part).

contractual terms in the lease, they become express factors to be weighed in the bidding decisions by prospective lessees. If not included in the lease but subsequently imposed as a result of CZMA consistency review of exploration or development plans, disagreement whether there has been a material modification of the contractual terms of the lease, or indeed a complete taking, is almost inevitable.

In summary, from a policy perspective, efficient and orderly development of OCS energy resources consistent with federally approved State coastal management programs can be accomplished only if both national interests -- OCS energy resource development and protection of the coastal zone -- are given full consideration at every stage of the process. Since the contractual OCS lease establishes the fundamental basis for all subsequent activities, CZMA consistency

must be applied at the lease sale stage if the national interest in OCS energy resource development is not to be thwarted by irreconcilable differences between the terms of the lease and the requirements of federally approved State coastal management programs.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals holding that the consistency review provisions of § 307(c)(1) of the CZMA apply to federal OCS lease sales should be affirmed.

DATED: August 11, 1983.

Respectfully submitted.

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July 22, 1982

FACT SHEET ON OCS LEASING SCHEDULE

Background: The 5 year leasing program announced today will replace the program covering the period from mid-1980 through mid-1985 which was approved in June 1980. A draft proposed program was announced April 16, 1981. A proposed program was announced July 15, 1981, and it was expected at that time that a final program could be adopted in early 1982. However, on October 6, 1981, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision on litigation involving the 5-year program adopted in June 1980. The court remanded the June 1980 program and its administrative record for revision in accordance with the OCS Lands Act. The tentative proposed final program was announced March 15, 1982, in accord with the court's October 6, 1981 order and a subsequent January 19, 1982 clarification order. The proposed final program was submitted May 11, 1982, to the President and the Congress for a 60-day notification period, which has now been completed.

Highlights of the Final Program: The OCS Lands Act requires that the program the secretary selects must "...consist of a schedule of proposed lease sales indicating as precisely as possible, the size, timing and location of leasing activity...." Highlights of the Secretary's decisions on each of these prime elements are:

Size: The size of the sales included in the proposed program issued in July 1981 was based on area-wide lease offerings. On December 15, 1981, the Secretary made a preliminary decision to refine that concept which he reaffirmed in his decision on the final leasing program. Under the refined concept, the department will consider entire planning areas for lease. In preparing for OCS offerings, the Minerals Management Service (MMS) will focus analysis on those portions of a planning area which MMS, the oil and gas industry and others believe have the potential for discovery of oil and gas. MMS will provide an environmental description of the entire planning area.

Acreage: The acreage in each planning area included in the program is: North Atlantic, 82 million; South Atlantic, 99 million; Western Gulf of Mexico, 35 million; Central Gulf of Mexico, 46 million; Eastern Gulf of Mexico, 38 million; Southern California, 22 million; Central and Northern California, 37 million; North Aleutian Basin, 32 million; St. George Basin, 70 million; Navarin Basin, 37 million; Norton Basin, 25 million; Barrow Arch, 30 million; Diapir Field, 49 million; Gulf of Alaska, 133 million; Kodiak, 89 million; Cook Inlet, 8 million; and Shumagin, 84 million. Total for all planning areas -- about one billion acres.

Sale Offerings: 41 sales are proposed from August 1982 through June 1987. By area they are: Gulf of Mexico, 12; Alaska, 16; California, 4; Atlantic, 8; and Reoffering (4 areas), 1 sale.

By year: 1982, 5 sales; 1983, 7 sales; 1984, 8 sales; 1985, 9 sales; 1986, 8 sales; 1987, 4 sales.

Resources: Estimated total remaining hydrocarbon resources in the OCS: 43.5 billion barrels of oil; 230.6 trillion cubic feet of gas. The Alaska OCS contains over half the total OCS acreage and much of the estimated remaining oil and gas resources.

Changes: From the proposed final to the final program three changes were made: Sale RS-2 was moved from July to August 1982; Sale 52 (North Atlantic) was moved from late August to October 1982, to allow further state consultation; Sale 76 (Mid-Atlantic) was moved from March to April 1983, because of a delay in the public hearing on the draft environmental impact statement.

Exhibit A

(Filed Aug. 11, 1983)

Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE COASTAL STATES ORGANIZATION, THE STATES OF CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, NEW YORK, NORTH CAROLINA, OREGON, SOUTH CAROLINA, AND WASHINGTON, AND THE BAY CONSERVATION DEVELOPMENT COMMISSION AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1326

JAMES G. WATT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

No. 82-1327

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners

v.

STATE OF CALIFORNIA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE COASTAL STATES ORGANIZATION, THE STATES OF CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, NEW YORK, NORTH CAROLINA, OREGON, SOUTH CAROLINA, AND WASHINGTON, AND THE BAY CONSERVATION DEVELOPMENT COMMISSION AS AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae, the Coastal States Organization as well as eleven individual states and the Bay Conservation De-

velopment Commission, submit this brief in support of respondents, the State of California, *et al.* The Coastal States Organization participated as amicus in the proceedings below, and counsel for all parties have given their consent to the filing of this brief.

The Coastal States Organization was established in 1969, three years prior to enactment of the Coastal Zone Management Act (CZMA). Its purpose is to provide the United States' coastal governors with a means to participate on a multi-state basis in the resolution of nationally significant coastal issues, to collectively advocate the responsible development and management of shared federal-state marine and shoreline resources, and to represent its member states' unique coastal interests before Congress and in other public policy forums.

The organization's membership consists of delegates who are appointed by the governors of 33 states, commonwealths and territories having an ocean, gulf or great lakes boundary. The delegates are their governors' official spokesmen on a wide range of state coastal issues such as natural resource protection and development, coastal zone management, ocean sciences, and related legislative and regulatory matters.

The Organization played a lead role in legislative efforts at the federal level leading to enactment of the CZMA (with representatives of the Organization testifying at all congressional hearings on the original Act and on the 1976 and 1980 amendments). The Organization has also participated extensively in congressional hearings on other environmental and marine-related legislation, including the Deepwater Ports Act in 1976 and amendments to the Clean Water Act.[1]

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[1] The Organization has sponsored national conferences on legislative proposals and other matters affecting coastal zone management. These have included conferences on revised legislative authority for the National Oceanic and Atmospheric Administration (NOAA), and on the 1980 amendments to the CZMA.

The Coastal States Organization also successfully represented the interests of its member states during the efforts by the federal government in 1981 to redefine the very issue of "consistency" being set forth in the arguments by the petitioners. The Department of Commerce proposed, then withdrew, because of congressional and coastal state opposition, regulations that would have prevented states from participating in the pre-lease stages of federal offshore oil drilling activities and decisions.

The interest of amici in this litigation is readily apparent. All of the states and territories in the Organization are coastal states or territories within the meaning of the CZMA. Twenty-eight of these states and territories have already developed and received federal approval for their coastal state management programs, including the eleven states appearing as amici here. The states and territories have undertaken these efforts with the legitimate expectation that they would exercise primary responsibility for management of the coastal zone and that the federal government would make its activities consistent with their programs, as contemplated by Section 307(c)(1). As the pace of federal offshore leasing increases, it is therefore essential that the right of the coastal states under the CZMA be respected.

SUMMARY OF ARGUMENT

The Court of Appeals in this case held that Section 307(c)(1) of the Coastal Zone Management Act requires the Secretary of the Interior to make the selection of tracts for leasing on the Outer Continental Shelf, and the award of leases thereon, consistent with state coastal zone management plans to the maximum extent practicable. That decision is correct for several reasons.

1. The CZMA, and Section 307(c)(1) in particular, reflect a congressionally-developed bargain designed to assure that state coastal zones are managed in accordance

with national interests. In return for the states' agreement to adopt coastal zone management programs embodying federal interests as well as federal procedures, the federal agencies, in turn, agreed to respect these programs while conducting activities directly affecting the coastal zone. The legislative history of the CZMA, both at the time of its passage and thereafter, emphasizes the importance of the federal obligation, making clear that it applies regardless of where the activities originate. Congress has also expressed its desire that federal agencies begin to take the coastal plans into account as soon as practicable, when the greatest benefits from federal review are still attainable. Pages 8-14, *infra*.

2. The selection and leasing of tracts is, in practical terms, the last stage at which the Secretary has a guiding role in the development process. After tracts have been selected and leased, the Secretary can no longer change the mix of tracts to be sold, properly account for the cumulative effects of overall development, or include stipulations in the leases themselves. Thus, if the Secretary is to give proper attention to state programs, he must do so before the leases are transferred. While the information at that time is not complete, it is more than sufficient to conduct the *initial* stage of what all parties concede to be a phased process of review. Pages 14-20, *infra*.

3. Neither the 1953 Tidelands Oil Compromise, nor Section 19 of the Outer Continental Shelf Lands Act, nor Section 307(c)(3)(B) of the CZMA is to the contrary. The coastal states do not seek to undermine federal ownership of the OCS, as embodied in the 1953 Compromise. Rather, they seek to carry out the responsibilities conferred on them by Congress in Section 307(c)(1) of the CZMA, responsibilities that are supplemented, not supplanted, by the provisions of Section 19 and Section 307(c)(3)(B). Pages 20-30, *infra*.

ARGUMENT

This case presents the question whether the selection and transfer of tracts for development on the Outer Continental Shelf (OCS) is a federal activity directly affecting the adjacent coastal zone, within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1456. While the statement of the issue is perhaps unavoidably dry, its resolution will nevertheless have a profound effect on the ability of coastal states to meet the obligations set forth in the CZMA and embodied in their own coastal zone management programs. According to petitioners, the Secretary of Interior may select tracts and transfer leases to private oil companies without any regard to CZMA requirements, despite the fact that Congress intended the CZMA to be a cooperative program between the coastal states and the federal government and the fact that the sale of leases is the last stage at which any meaningful cooperation between the affected states and the federal government can be achieved. In our view, to permit such disregard would defeat the central purpose of the CZMA.

It is important to understand that the issue here is not *whether* the CZMA is applicable to development of oil and gas resources on the OCS but *when* it becomes so. Even petitioners recognize that the CZMA at some point requires state coastal programs to be taken into account. *See* U.S. Br. 21, 43; WOGA Br. 27-29. Petitioners simply would prefer that attention to the CZMA be paid later rather than sooner, after the federal government has passed control over the leased tracts to the oil companies rather than before. As we discuss below, however, that preference is directly contrary to the intent of Congress, which has made quite clear that consideration of state plans should begin as soon as possible rather than on a belated, haphazard basis.

I. Congress Intended That Section 307(c)(1) of the CZMA Be Applied to the Sale of OCS Leases By the Federal Government

Because it is hornbook law that construction of a statute begins, and sometimes ends, with its language, petitioners make an industrious effort to divine a plain meaning in the phrase "directly affecting." But the term "directly," to which most of the attention is paid, "is not a word of art, defined and limited; like most words in the English language it has multiple meanings depending upon the context in which it is used." *Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 951 (5th Cir. 1979).[2] The proper inquiry, therefore, is not what the term means in the abstract but whether particular situations are meant to be covered by it. Here, the question is whether the transfer of leases is the sort of activity for which Congress wanted a consistency review.

The language of Section 307(c)(1), standing alone, provides no inescapable answer. In choosing the language of the section, Congress did not identify OCS lease sales or any other particular federal activity as being within or without the terms of the statute. Rather, without further specification, it simply required that federal activities "directly affecting" the coastal zone be made consistent to the maximum extent practicable with state coastal plans. Although it contains no express exceptions, the term "directly affecting" gives little guidance about what federal activities have a sufficient impact on the coastal zone to fall within its requirements.

The legislative history does not explain why Congress chose this particular term. Although both the House and

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[2] It is worth noting that, although the Secretary seems to believe that one of the meanings of "directly" is "physically," U.S. Br. 21, the dictionary contains no such definition. *See* Webster's Third New International Dictionary Unabridged 640 (3d ed. 1971).

Senate versions of Section 307(c)(1) applied only to federal activities *in* the coastal zone, the language was changed in conference to its present form. H.R. Rep. No. 1544, 92d Cong., 2d Sess. 7, 14 (1972) (Conference Report), *reprinted in* Congressional Research Service, Library of Congress, 94th Cong., 2d Sess., *Legislative History of the Coastal Zone Management Act of 1972, as amended in 1974 and 1976* (Comm. Print 1976). At the same time, Congress incorporated into the CZMA a definition of the coastal zone that excludes all federal lands. The conferees did not specifically address the scope of the term "directly affecting."[3]

The lack of precise definition in the language and legislative history, however, does not mean that the search for meaning is bootless. For, "[a]s in all cases of statutory construction, our task is to interpret the words of th[is] statute[] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). Viewed in those terms, the inquiry is more rewarding. To begin with, of course, Section 307(c)(1) is part of a statute whose origin and purpose are well-established. Moreover, both at the time of its passage and later, Congress has specifically addressed the purpose and scope of Section 307(c)(1) itself. These materials demonstrate quite plainly that Congress did not intend the Secretary, in selecting and awarding tracts for development, to turn a blind eye to state coastal plans.

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[3] Nothing in the legislative history supports petitioners' assertion that the term "directly affecting" was meant to address only federal lands within the coastal zone. Indeed, in explaining the precise definition of the coastal zone, the Conference Report noted that federal interests in a number of areas, including the Outer Continental Shelf, were unaffected by its definition of the coastal zone. *Id.* at 12. "As to the use of such lands which would affect a state's coastal zone," the conferees concluded, "the provisions of section 307(c) would apply." *Ibid.* See also pages 11-12, *infra*.

A. The Coastal Zone Management Act

Although this case at first glance might seem like a dispute between national and local concerns, the fact is otherwise. For it is clear that, in enacting the CZMA, Congress intended to serve *national* objectives. The congressional findings, for example, expressly recognize that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress further declared that "it is the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 16 U.S.C. § 1452(1).

To serve this interest, Congress gave to the coastal states the primary responsibility for management of the coastal zone. Congress specifically found that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the *states* to exercise their full authority over the lands and waters in the coastal zone . . . ." 16 U.S.C. § 1451(i) (emphasis added). The Senate Committee in its report on the 1972 Act pointed out that the states are to be "the focal point for developing comprehensive plans and implementing management programs for the coastal zone." S. Rep. No. 753, 92d Cong., 2d Sess. 5 (1972). The House Committee agreed, observing that " 'states must assume primary responsibility for assuring that the public interest is served in the multiple use of land and water in the coastal zone.' " H.R. Rep. No. 1049, 92d Cong., 2d Sess. 10 (1972).[4]

If the CZMA had simply confirmed state authority over the coastal zone, however, it would have been largely unnecessary. Under the terms of the "1953 Compromise," upon which WOGA greatly relies, the states al-

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[4] A principal policy of the CZMA, as finally enacted, is "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone . . ." 16 U.S.C. § 1452(2).

ready possessed the authority to "manage, administer, lease, develop and use" the lands and natural resources in the coastal zone. 43 U.S.C. § 1311(a). What the states lacked, and what Congress gave them in the CZMA, was influence over the development of federal lands or resources, such as federally-owned oil and gas resources on the Outer Continental Shelf, with critical consequences for management of the coastal zone. The CZMA thus represents a carefully-considered bargain in which the states agreed to develop coastal plans in accordance with federal procedures and standards in return for an agreement that federal activities directly affecting the coastal zone would be made consistent with those plans to the maximum extent practicable.

The provisions of the CZMA reflect that bargain in considerable detail. To begin with, the statute specifies the areas of concern that must be addressed in a state management plan. *See* 16 U.S.C. § 1454(b). In particular, every state plan must include "[a] planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including but not limited to, a process for anticipating and managing the impacts from such facilities." 16 U.S.C. § 1454(b)(8). Furthermore, state programs must take account of the possible tension between management of the coastal zone and the national interest in expedited production of oil and gas. If it is to receive approval, a program must provide for "adequate consideration of the national interest in planning for, and in the siting of, facilities (including facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature." 16 U.S.C. § 1455(c)(8). No state plan, therefore, may be put into place if it shortchanges national energy needs in the interest of local concerns.[5]

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[5] Indeed, petitioner WOGA and various oil companies challenged the very coastal zone management plan at issue here on the ground, *inter alia*, that it failed to take account of national interests in the

The Act also contains a gauntlet of federal review to assure that the programs in fact meet the statutory standards. As a first step, in preparing their programs, the coastal states must solicit and consider the comments of all federal agencies with jurisdiction over activities that might affect the coastal zone. 15 CFR § 923.51 (d) (1-5). The final programs, as submitted, then must specifically address the comments from such agencies regarding "the national interest in the planning for or siting of facilities which are more than local in nature." 15 CFR § 923.51 (d) (5) (ii). Subsequently, when the programs are reviewed by the Department of Commerce for approval and adoption, the federal agencies are again given full opportunity to comment upon, criticize, and insist on changes in any part of the states' coastal zone programs. *See* 15 CFR § 923.72.

Having assured that state plans adhere to federal standards, and address federal concerns, Congress in return guaranteed to the states that the objectives embodied in the plans would not be disregarded. The linchpin of this commitment is the statutory requirement of federal consistency provided in Sections 307 (c) (1) and (c) (2), 16 U.S.C. § 1456 (c) (1)-(2). By committing federal agencies to act in a manner consistent with the state programs, Congress assured participating coastal states that their management of the coastal zone would not be frustrated by conflicting federal action. This assurance, of

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development of offshore oil and gas resources. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Both the District Court, 456 F.Supp. at 922-27, and the Court of Appeals, 609 F.2d at 1313-15, conclusively rejected WOGA's claims, affirming the administrative determination that California's plan struck an equitable balance between national and state interests in energy development. State plans typically address issues arising from lease sales in considerable detail. *See, e.g.*, U.S. Department of Commerce, *State of Connecticut Coastal Management Program and Final Environmental Impact Statement* at II-230.

course, is directly contrary to the business-as-usual claims made by petitioners in this case.

The views of Congress on the importance of federal consistency are hardly enigmatic. At the time of passage, Congress expressed its clear intent that federal agencies conform their activities to approved state management plans. The Senate Report notes that "[i]nasmuch as Federal agencies are given a full opportunity to participate in the planning process, the committee deems it essential that Federal agencies administer their programs . . . consistent with the State's coastal zone management program." S. Rep. No. 753, 92d Cong., 2d Sess. (1972), *reprinted in CZMA Legislative History*, *supra*, at 240. The Senate Committee report on the 1976 amendments states that the consistency section "assures that once state coastal zone management programs are approved and a rational management system for protecting, preserving, and developing of the States' Coastal Zone is in place. . . , *the Federal departments, agencies, and instrumentalities will not violate such systems. . . .*" S. Rep. No. 277, 94th Cong., 1st Sess. 37-38 (1975) (emphasis added). Indeed, the Committee specifically noted the "leverage [participating coastal states] will gain over federal activities affecting the coastal zone," saying that such leverage would be "a powerful incentive for completion of the state program development process." *Id.* at 20. Similarly, the House Committee report stated that "[t]his [consistency] provision of the original act is one of the principal incentives for the states and local governments to take part in the Coastal Zone Management Program." H.R. Rep. No. 878, 94th Cong., 2d Sess. 53 (1976).

Although petitioners emphasize again and again that the activities at issue here take place on federal property, that fact is essentially irrelevant. In addressing the requirement of federal consistency, Congress has made clear that the federal government may not evade its obligations by pointing to the site rather than the effect of its activities. The 1971 Senate Report, while explaining

the intent of Congress concerning the federal activities to be subject to Section 307(c)(1), stated unequivocally:

> It is intended that any lands or waters under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering federal agency determines them to have a functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone, should be administered consistent with approved state management programs.

S. Rep. No. 526, 92d Cong., 1st Sess. 30 (1971).[6] Similarly, Congress listed as one of the aims of the statute the encouragement of cooperation between the coastal states and federal agencies "engaged in programs affecting the coastal zone." 16 U.S.C. § 1452(c) (as amended, 16 U.S.C. § 1452(4)). As we have noted (page 9 *supra*), state management programs must include adequate consideration of plans for energy facilities "which significantly affect" the coastal zone, 16 U.S.C. § 1455(c)(8), and grants are provided for activities relating to energy facilities "which significantly affect" the coastal zone. 16 U.S.C. § 1456a(a)(1)(B). It is unmistakable, therefore, that Congress has taken a practical, rather than a geographic, view of the scope of Section 307(c)(1).

In recent years, Congress has been even more explicit about the scope and intent of Section 307(c)(1). In 1980, while specifically addressing the question whether the term "directly affecting" applied to the sale of OCS

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[6] This legislative history effectively defeats the notion, advanced by the Secretary, that the term "directly affecting" requires some immediate "physical impact." *See* U.S. Br. 21. It also defeats the idea that Congress intended Section 307(c)(1) to apply only to "those activities on federal lands within the confines of a state's coastal zone." U.S. Br. 24. That view, in fact, was again rejected when Congress was considering the 1976 amendments to the CZMA. The relevant Senate report noted that Section 307(c)(1) included "activities *in or out of* the coastal zone which affect that area." S. Rep. No. 277, 94th Cong., 1st Sess. 36-37 (1975) (emphasis added).

leases, the relevant House Committee Report emphasized that consideration of state coastal plans should begin "at the earliest practicable time." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). The Committee then went on to suggest that federal activities directly affect the coastal zone whenever they have "a functional interrelationship from an economic, geographic or social standpoint with a state coastal program's land or water use policies," *ibid.*, a formulation that openly echoes the language from the 1971 Senate Report. Alternatively, the Committee indicated that Section 307(c)(1) should apply "when a federal agency initiates a series of events of coastal management consequences." *Ibid.* The relevant Senate report likewise pointed out the importance of timely review, noting that "[a]s a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).[7]

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[7] The Report stressed that "[c]oordination must *continue* during the critical exploration, development, and production stages," *id.* at 11, lending further weight to the idea that review is a continuing process beginning with the leasing stage itself.

Although we recognize the hazards of relying on subsequent legislative history, *see Andrus v. Shell Oil Co.*, 445 U.S. 657, 667-68 (1980), the 1980 materials possess two virtues altogether lacking in the reports relied upon by petitioners. *See* WOGA Br. 31-33, 40-44; U.S. Br. 28-38, 40. First, they address precisely the question and provision here at issue, and do not depend, as do petitioners' tenuous arguments based upon Section 307(c)(3)(B) and Section 19 of the OCSLA, upon inferences derived from what Congress failed to do or say. *See* pages 24-30, *infra*. Second, the understanding of the effect of Section 307(c)(1) expressed by Congress in 1980 carries out the purposes of the statute as amended by Congress that year. Following extensive review of the CZMA, Congress amended the statute to re-emphasize as one of its purposes the importance of "encourag[ing] the participation and cooperation of the public, state and local governments . . . as well as of the Federal agencies having programs affecting the coastal zone. . . ." Pub. L. No. 96-464, § 3, 94 Stat. 2060 (1980), *codified at* 16 U.S.C. § 1452(4). The House

Although the Secretary is plainly unhappy with his end of the bargain, the fact is that Congress has never wavered from its intention to make federal agencies conform their programs, to the maximum extent practicable, to the state plans. From the very beginning, Congress has sought cooperation from federal agencies "engaged in programs affecting the coastal zone," and in more recent years it has made pointed reference to its wish to get the process moving "at the earliest practicable time." Not once, either at the time of passage of the CZMA or at any later time, has Congress ever said that it wished to exempt from Section 307(c)(1) either activities on the Outer Continental Shelf generally or lease sales in particular. As we discuss below, such an exemption would clearly undercut the balance that Congress established in the CZMA.

B. The Leasing Stage

It is important, at the outset, to recognize that few, if any, federal programs have a greater impact on the coastal zone than oil and gas leasing on the Outer Continental Shelf. Offshore oil and gas operations present unique problems of equipment and transportation and unusual perils to the fragile ecostructure of the coastal zone. It is obvious, therefore, that, if the CZMA is to mean anything at all, leasing activities must be squared at some point with management plans for the coastal zone. Moreover, given the magnitude of the possible effects and the importance of rational planning to accommodate them, it is logical to assume that Congress intended review to occur at the earliest possible phase, when, as the Court of Appeals found, "the basic scope and charter for subsequent development and production" is established. U.S. Pet. App. 13a.

Petitioners take the view, however, that the selection of tracts, and the award of leases, are events of little

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Report expressly stated that Congress intended this goal to be effected through a broad construction of Section 307(c)(1). H.R. Rep. No. 1012, 96th Cong., 2d Sess. 35 (1980).

consequence, which create no need for attention to state coastal plans. Nothing could be further from the truth. At the very least, the sale of a lease changes a tract *protected* from development into one *slated* for development, a change of signal importance to those charged with accommodating the effects of development. On land, when an open space is sold for residential or industrial development, the adjacent landowner need not see the first blocks of granite to know that his property has been seriously affected. The same is true of planned development on the Outer Continental Shelf: once a tract has been awarded, its character as a protected area has been lost. It makes little sense for that change to take place without any regard for the requirements of state coastal plans.[8]

The award of leases also marks a radical change in the role of the federal government. After the lessees have invested millions of dollars to acquire the tracts, they, and not the federal government, are primarily responsible for all subsequent activities.[9] It is the lessees, and not

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[8] The sale of a lease authorizes the lessee to conduct preliminary activities on the tract *without* any further approval by the federal government. Those activities are defined by regulation to include "geological, geophysical, and other surveys necessary to develop a comprehensive exploration plan." 30 C.F.R. § 250.34-1. Lessees are allowed to penetrate the seabed up to 300 feet in unconsolidated formations and 50 feet in consolidated formations. The regulations even allow for an adverse impact on OCS natural resources so long as it is not "significant." *Ibid.* Indeed, the Secretary seems to concede the existence of some "direct effects" from a lease sale itself, though he characterizes them as "extremely limited." U.S. Br. 29.

[9] Once the decision to sell particular tracts has been made, the state has no alternative but to consider the changed status of a tract in making decisions about nearby coastal areas. As petitioners point out, exploration on some tracts may be delayed for several years, after which the tracts may be explored and developed on a haphazard basis. U.S. Br. 43-45 & n.37; WOGA Br. 28 & n.23. If the state must wait for this lengthy and random process to evolve before learning how development may be shaped to accommodate its plan, the state will be forced to manage its coastal area with needless uncertainty.

the government, who decide what tracts are to be developed and when development shall start; it is the lessees, and not the government, who draw up the plans for exploration and development, including the specifications for drilling and related equipment; it is the lessees, and not the government, who choose how any resources shall be transported and how to protect against spills and other damage. Although the government may disapprove these plans in certain instances, it plays an essentially passive role. The lease-sale stage, therefore, is the *last* stage at which the federal government has anything approaching full control over the course of development on the Shelf.

This control is of more than cosmetic importance. For example, as the Court of Appeals noted, the leasing stage is the only opportunity to review the cumulative impacts of oil and gas development on the coastal zone. U.S. Pet. App. 13a. With regard to management of the coastal zone, of course, it would be a pyrrhic victory for the states to achieve consistency on individual tracts while the total effects of development nonetheless caused significant damage to the environment. Yet, at later stages, after the leases have passed into the hands of the lessees, consistency determinations can be made only on a tract-by-tract basis under Section 307(c)(3)(B).

The leasing stage is also the only opportunity for the federal government to consider state plans in deciding how many and what parcels within an area are to be developed.[10] Because the federal government controls not

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[10] While the Secretary says that any effects on the coastal zone "do not stem from issuance of a lease, but from subsequent federal approval of exploration, development and production plans," U.S. Br. 22, that analysis is too superficial. In the end, any development results from a series of decisions beginning with tract selection and the award of leases proceeding through initial exploration and culminating in actual production and transportation. Not only is each stage a prerequisite to the next, but the selection of tracts is a uniquely important step, for no activity at all can occur on a tract unless the Secretary designates it for lease.

only the tracts selected for development but the tracts not selected, it can revise the leasing program to assure the least possible adverse effects on the coastal zone. By the same token, review at the lease stage gives the Secretary a chance to identify appropriate stipulations for inclusion in various leases. The stipulations can, of course, then be modified to reflect any additional information as exploration and development proceed.[11]

These benefits cannot be assured through later review of the exploration and development plans of the individual lessees, whatever information the lessees may provide. Although the lessees are required to conform their individual proposals to state plans, they can neither plan for nor control the overall effects of leasing in the coastal area. Nor can the individual lessees make changes in the tract selection or bind their competitors as well as themselves to necessary restrictions. The individual lessees also have no special obligation to balance development with environmental concerns, as the federal government does. *See* 43 U.S.C. § 1802(2)(B).

The thrust of petitioners' argument, however, is not that early review is inappropriate, but that it is impossible. They insist that the Secretary cannot make a consistency determination at the lease-sale stage, saying that the available information will not allow for resolution of all possible uncertainties. *See* WOGA Br. 30, 45; U.S. Br. 43-45. That argument is faulty on several grounds. First of all, it simply misses the point. The consistency review under Section 307(c)(1) is not intended to be the

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[11] It is obviously preferable for all concerned to have these conditions specified at the outset, when they can be weighed in the bidding decision, rather than to allow them to become a needless point of controversy after a lease has been awarded. In addition, the use of generic stipulations promotes fairness among the potential lessees, since stipulations proposed at the outset can be applied fairly and uniformly to all lessees. If review is delayed, the effect of necessary restrictions may fall more harshly on the lessees who seek approval of exploration and development plans after the plans of others have been approved without restrictions.

only review, or the final review, but merely the first of a series of reviews concededly envisioned by the CZMA. To be sure, review at the lease sale stage could not be expected or intended to resolve every contingency related to the ultimate development of offshore oil resources, just as review at the exploration stage cannot settle all possible questions regarding development. Rather, as the regulations implementing Section 307(c) clearly indicate, the Secretary would be called upon to conduct a review "in phases based upon developing information, with each subsequent phase subject to Federal agency discretion. . . ." 15 C.F.R. § 930.37(c) (1983).

In any event, petitioners improperly belittle the information that in fact exists when tracts are selected for lease. To begin with, the Secretary must prepare a comprehensive environmental impact statement prior to the final selection of tracts for leasing. 42 U.S.C. § 4332 (2)(c). The EIS will necessarily contain comprehensive information about environmental conditions in the affected area, including conditions within the coastal zone, as well as certain information about the prospects for oil and gas development on the tracts. The Department of Interior may supplement this information with data from a variety of tests short of actual drilling, receive data from tests conducted by potential lessees, and study data generated by exploration and development in related areas. *See* 43 U.S.C. § 1352.

While obviously not definitive, the data are used for numerous significant purposes. Most importantly, of course, the data are considered sufficient for the Secretary to make the very decision in question here: the choice of tracts for lease. In addition, the Secretary uses such information to determine matters of profound importance to the state's coastal zone, including the timing of the sale and any stipulations to which the leases would be subject. As the Court of Appeals noted, "[t]hese choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of coastal

zone will be subject to danger, the flow of vessel traffic, and the siting of on-shore construction." U.S. Pet. App. 13a.[12]

In other circumstances, the Secretary has used the information available to him at the leasing stage to take precisely the sort of actions that would ordinarily flow from a consistency review at that stage. In Lease Sale 48, for example, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel at the lease-sale stage for reasons similar to the environmental concerns embodied in California's approved state management plan. Letter from Secretary Andrus to Governor Brown (June 29, 1979). In addition, the Secretary has frequently imposed stipulations on proposed leases to substantially reduce adverse coastal impacts. *See* Solicitor's Opinion (October 1979), C.P. 3, Cal. Exh. L-11, at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978); *North Slope Borough v. Andrus*, 642 F.2d 589, 595-97 (D.C. Cir. 1980.)

We also note that, where it has suited a different purpose, the oil companies have made much of the detailed information collected prior to a lease sale. Just four years ago, the Assistant General Manager of WOGA attested "to very substantial contributions in time and money made by the engineers, environmental experts and scientists of member companies." Affidavit of Robert N. Harrison, filed June 25, 1979, in *Energy Action Educational Foundation v. Andrus*, No. 79-1633 (D.D.C.). According to this WOGA official, prior to bidding on leases, member companies "have participated in intense geological and

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[12] In addition, the information provides the only real basis for determining whether bids are sufficient. Because the Secretary has the authority to refuse bids, and is required by the OCSLA to assure receipt of fair market value for the leased tracts, 43 U.S.C. § 1344(a)(4); *see generally Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), the information available before the lease sale plays an essential part in determining whether that requirement is met.

engineering evaluations of the proposed lease tracts" that include "seismic and other geophysical surveys, bottom sampling, core holes, geological field work, engineering analysis of sea floor conditions, accumulations of cost data relative to drilling, platform construction and pipeline construction, and many other activities needed for evaluation of tracts." *Ibid.*

This sort of information is more than adequate for a meaningful first step in the review process. While the Government suggests that the coastal states would demand consistency at the lease-sale stage for every conceivable contingency, that fear is wildly overstated. The principal concern of the coastal states is, rather, to assure that the government does not initiate development of tracts when it is apparent, in light of the known conditions and the available technology, that development *cannot* be made consistent with the state plan even with adequate stipulations. Moreover, even when the inconsistency is not "incurable" or may disappear as further information is acquired, it makes sense for the federal government to take all practicable measures to see that the lessees are aware of these concerns before the leases are awarded. Such notice, in fact, should reduce unnecessary friction as exploration and development proceeds.

In short, an initial consistency review at the lease-sale stage is both possible and necessary to serve the purposes of Section 307(c)(1). *See Conservation Law Foundation v. Watt*, No. 83-0506 (D.Mass. March 28, 1983), Slip Op. at 40. Petitioners have simply confused an unwillingness to carry out that review with an inability to do so.[18]

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[18] The authority to revoke leases after they have been awarded is a poor substitute for early review. In the first place, despite the Sectary's suggestions, *see* U.S. Br. 30, the revocation of a lease is a slow and costly process that can only occur in very narrowly defined circumstances, following a hearing. *See* 43 U.S.C. § 1334(a)(2)(A). Moreover, it strains credulity to suppose that financial and political considerations will not color a decision on the merits once lessees have paid millions of dollars for a particular tract that may be the

II. The Other Statutory Provisions Relied on by Petitioners Do Not Relieve the Federal Government of Its Obligations Under Section 307(c)(1)

Although petitioners do give passing attention to Section 307(c)(1), they have been unable to discover any language or any legislative history, contemporaneous or subsequent, that exempts lease sales from the requirements of that section. To compensate, therefore, petitioners devote much of their briefs to statutory provisions other than the one actually at issue here. In their efforts to cut down the obligations of the federal government under Section 307(c)(1), they range from the 1953 Tidelands Oil Compromise to the Outer Continental Shelf Lands Act Amendments (OCSLAA) to Section 307(c)(3)(B) of the CZMA. None of these provisions is helpful to their cause.

A. The Tidelands Oil Compromise

While petitioners stoutly maintain that the CZMA does not disturb the "1953 Compromise" allocating ownership of submerged offshore lands among the states and the federal government, no one has said that it does. The federal government is free to conduct activities on the Outer Continental Shelf and to derive revenues and other benefits from them. But Congress has recognized that, in doing so, the federal government may cause effects not just on the OCS, over which it has authority, but on the coastal zone as well, over which the states have authority. In that case, Congress provided in Section 307(c)(1) that the federal activities be made consistent with state coastal plans to the maximum extent practicable.

Despite their repeated invocations of the "1953 Compromise," petitioners also fail to note or appreciate that the compromise confirming federal authority over natural resources on the Outer Continental Shelf at the same

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subject of dispute. Finally, despite the Secretary's argument, we note that WOGA is eloquently mum on this subject.

time confirmed the states' authority to manage and to plan for development of the coastal zone. Without the later promise in the CZMA of some measure of influence over federal activities affecting their coastal zones, the states had far less incentive to participate in the CZMA or to surrender any of their control through the process of consultation and accommodation required to obtain approval of a coastal zone management plan. And without some means to assure comprehensive planning and review of all significant actions affecting the coastal zone, regardless of where they originate, Congress would have been unable to achieve its stated purpose of pursuing the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). The CZMA, in short, can only be understood as a *mutual* accommodation between the states and the federal government to secure the larger goal of comprehensive management of the coastal zone. In this context, petitioners' arguments about "federal paramountcy" based on ownership have no place.[14]

Petitioners' exhortations about the need to assure "federal paramountcy" also misstate the burden imposed by Congress on the federal agencies through Section 307(c)(1). Although petitioners repeatedly invoke the spectre of a state veto over federal leasing plans, U.S. Br. 26; *see* WOGA Br. 25, 45, it must again be remembered that the coastal plans are developed in accordance with

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[14] Petitioners' argument about undiluted federal authority rests in part upon the view that Section 307(e) of the CZMA, 16 U.S.C. § 1456(e), was explicitly intended to free federal agencies from the consistency requirement of Section 307(c)(1) by confirming the division of authority spelled out in the "1953 Compromise." *See* WOGA Br. 39; U.S. Br. 26. Petitioners offer neither logic nor legislative history to support their expansive reading of Section 307(e), which was specifically rejected by the National Oceanic and Atmospheric Administration (NOAA) in promulgating its regulations under the statute. NOAA determined that Section 307(e) was not intended to affect federal agencies' obligations under Section 307(c)(1). 44 Fed. Reg. 37,146 (1979).

federal standards and approved only after full review by all affected federal agencies. Thus, even if Section 307(c)(1) did confer a veto, it would arise from a conflict between one federal program (OCS leasing) and another federal program (Coastal Zone Management), not from the whim of an individual state. But, in any event, Section 307(c)(1) does not confer a veto over OCS leasing: the statute requires that the federal government conform to state plans "to the maximum extent practicable," 16 U.S.C. § 1456(c)(1), a requirement that current regulations interpret to allow an override of state plans where other federal laws so require.[15] Although WOGA apparently believes that this standard is insufficient to guarantee the necessary "federal paramountcy" over the Outer Continental Shelf, *see* WOGA Br. 19, the proper course is to ask Congress to change it, rather than to refuse to make consistency determinations at all.[16]

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[15] We agree with California that the Ninth Circuit should not have addressed this issue in the absence of any determination of consistency or inconsistency by the Secretary.

[16] The Secretary's quarrel with this balance of authority warrants even less scrutiny. In substance, the Secretary argues that because the federal agencies have never understood Section 307(c)(1) to apply to leasing, the federal agencies failed to consider the federal interest in the siting of energy facilities during the approval process for state management plans. *See* U.S. Br. 17, 25. Reduced to its essentials, this argument apparently asks this Court to misinterpret Section 307(c)(1) in order to accommodate a prior misinterpretation by the Secretary, an unappetizing request on its face. The argument is particularly inappropriate in this case, since both the Justice Department and NOAA have consistently warned Interior of its error. *See* Letter, April 20, 1979, from Office of Legal Counsel, Department of Justice, Joint App. 35; Memorandum, March 23, 1979, from General Counsel, NOAA, *id.* at 48. Moreover, the state plans submitted to the federal agencies for approval were required by the CZMA to include plans for the siting of energy facilities. 16 U.S.C. § 1455(c)(8). The Secretary could thus have failed to address this question only by consciously ignoring key elements of every state plan.

B. Section 19 of the OCSLA

Petitioners also maintain that the recent amendments to the OCSLA, permitting states to make "recommendations" concerning proposed lease sales, were intended by Congress to set the outer boundary of state involvement in federal leasing activities. This argument is unpersuasive for several reasons. First, it wrongly exalts the goal of increased oil and gas production at the expense of other equally prominent goals of the OCSLA. Second, it misapprehends the differences in scope and emphasis between Section 307(c)(1) of the CZMA and Section 19 of the OCSLA.

Although the OCSLA undeniably was intended "to result in expedited exploration and development" of the Outer Continental Shelf, 43 U.S.C. § 1802(1), that was by no means the only purpose. On the contrary, the clear message of the OCSLA is that accelerated development of oil and gas resources is not to be achieved at the expense of other natural resources. It is an express purpose of the Act, therefore, "to balance orderly energy resource development with protection of human, marine, and coastal environments." 43 U.S.C. § 1802(2)(B). In its statement of policy, Congress further recognized that development of offshore resources must be "subject to environmental safeguards." 43 U.S.C. § 1332(3). The Act is replete with provisions that require sensitivity to environmental concerns. *See, e.g.*, 43 U.S.C. § 1334(a)(1); 43 U.S.C. § 1344(a)(1); 43 U.S.C. § 1346. The OCSLA thus provides no basis for inferring that environmental concerns should be given short shrift.

The Act also makes clear that Congress intended to increase, rather than diminish, the role of state governments in the planning and operating of offshore activities. Another express purpose of the 1978 amendments to the OCSLA was to provide coastal states "an opportunity to participate in policy and planning decisions relating to management of the Outer Continental Shelf." 43 U.S.C. § 1802(b). Unlike the CZMA, which limited

state influence over the OCS to federal actions that also directly affected the coastal zone, the OCSLA provided states a direct voice in federal decisions regarding oil and gas development on the Outer Continental Shelf, whatever their effect on the coastal zone might be.[17]

The role provided to the states under the OCSLA is tailored to its purpose to expand state participation into certain federal decisions involving the Outer Continental Shelf. Thus, unlike the CZMA, both states and officials of local governments are permitted to comment upon proposed leasing plans under the OCSLA. 43 U.S.C. § 1345. Moreover, the substance of the recommendations is unrestricted. A governor may complain about all leasing, even if it can be carried out without significant environmental damage, or the bidding systems to be used, or the division of proceeds from drainage tracts. At the same time, the effect of these recommendations is quite limited. The Secretary may disregard them if, in his discretion, he finds that they do not provide "for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c)-(d).

By contrast, state influence over federal activities directly affecting the coastal zone, as provided by the CZMA, is at once more narrow but more substantial. State influence is limited to a consistency review based on a management plan that has been subjected to federal scrutiny and approval to ensure that national interests have been accounted for. Because the plan *already* pro-

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[17] Although WOGA seems to suggest that application of state coastal programs to OCS development is controlled by the OCSLA, the suggestion is patently incorrect. Even the provisions conceded by WOGA to require consistency were in place several years before the OCSLA was amended. The effect of the OCSLA was not to enlarge or reduce the requirements of the CZMA but to leave them intact. *See* page 26, *infra*. It is well recognized, of course, that repeals by implication are not favored. *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974).

vides for a "reasonable balance" between national and local interests, the responsibility of the federal government to the states is a heavier one. Individual federal agencies may not make their own assessment of the national interest but must conform their activities to the plan to the maximum extent practicable.

While the CZMA and the OCSLA thus plainly address related concerns, the different burdens that each imposes on the federal government are entirely appropriate to their distinct purposes. Indeed, in enacting the OCSLA amendments in 1978, Congress made crystal clear its intent not to disturb the consistency requirement of Section 307(c)(1) governing lease sales. The House Report accompanying Section 19 of the OCSLA states:

> The Committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan.

H.R. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added). Congress manifested this intent in the statute itself, where it provided specifically that "nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ." 43 U.S.C. § 1866(a).[18]

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[18] The Department of Justice, in its 1979 opinion, likewise relied upon the savings clause and legislative history of the OCSLA to conclude that Section 19 was not intended to replace consistency

C. Section 307(c)(3)(B) of the CZMA

Lacking any legislative history of Section 307(c)(1) to support their position, petitioners rely instead on the subsequent legislative history of another section, Section 307(c)(3)(B), to argue that Congress disavowed the need for consistency determinations at the lease-sale stage. WOGA Br. 40-42; U.S. Br. 31-35. According to petitioners, the fact that Congress in 1976 declined to add the word "lease" to the provisions requiring consistency reviews by private parties must mean that federal activities were excluded by Congress in passing Section 307(c)(1) in 1972. The argument is without merit.

To begin with, the deletion of the word "lease" from proposed Section 307(c)(3) cannot support the negative pregnant attributed to it. In light of the language and purpose of Section 307(c)(1), the ultimate deletion of this language may be read quite easily to indicate a congressional belief that adequate coverage was already provided by that earlier section. Because even petitioners acknowledge that the language was withdrawn to allow further study, WOGA Br. 41; U.S. Br. 32; *see* 122 Cong. Rec. 6128 (1976), it is entirely logical to assume that Congress found a need for *additional* consistency review only with respect to plans subsequently submitted by les-

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review of lease sales under Section 307(c)(1). *See* Department of Justice Opinion, Joint App. 44-45.

Although WOGA somehow finds this legislative history to be a "meager indication of congressional intent," WOGA Br. 26 n.19, that response is a peculiar one. First, there is little reason to suppose that views about the limitations of Section 19 of the OCSLA (to which WOGA points) were meant to amend *sub silentio* the provisions of the CZMA, especially when Congress expressly disavowed any such intention. Second, the recognition by WOGA that *some* lease sales are meant to fall within Section 307(c)(1) flatly contradicts their earlier point that such application would be inconsistent with the Tidelands Compromise.

sees. The lessees, of course, are not subject to the provisions of Section 307(c)(1).[19]

This argument also obscures the essential distinction between Sections 307(c)(1) and 307(c)(3). Although Congress was amending the provision relating to lessees (307(c)(3)), it would have been senseless to require lessees to make the initial consistency determination because, at the key time when tracts are selected, there are no lessees. Indeed, as the Secretary notes (U.S. Br. 32), Interior expressed concern at the time that a lease applicant simply could not carry out such an obligation. The logical solution, therefore, was to have Interior itself make the determination, as the Senate Committee apparently desired. S. Rep. No. 94-277, 94th Cong., 1st Sess. 19-20 (1975). But the obligations of *federal* officials were, as they always had been, covered by (c)(1), and amendment of (c)(3) to apply to the Secretary would have turned the statute on its head. Thus, the eventual decision not to subject the Secretary to the wrong provision of Section 307 hardly should be held to mean that he was exempt from the right one as well.[20]

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[19] The Secretary suggests, U.S. Br. 31, that the debate over the proposed amendments to the CZMA marked the first time Congress considered applying the consistency requirement in any fashion to oil and gas development, and that, therefore, the requirements added to Section 307(c)(3)(B) constitute the only applicable provisions. In fact, the debate in the House makes clear that Congress assumed the consistency provisions of the original act governed OCS oil and gas development regardless of whether Section 307(c)(3) was amended to include the term "lease." 122 Cong. Rec. 6112 (1976) (Remarks of Rep. Du Pont); *id.* at 6120 (Remarks of Rep. Hughes).

[20] The legislative history provides no support for petitioners' suggestion that the proposed amendment to Section 307(c)(3) was withdrawn because of a general dearth of information necessary to conduct a consistency review at the leasing stage. U.S. Br. 32-34; WOGA Br. 40-42. Rather, the Conference Report shows clearly that Congress felt that review of exploration and development plans under Section 307(c)(3)(B) would satisfy the need "for complete information, on a timely basis, about details of *the oil industry's*

Finally, it is evident that petitioners' argument proves too much. Although petitioners assert that the 1976 amendments to the CZMA demonstrate congressional intent "not to make leases subject to CZMA consistency," WOGA Br. 42, at other times they concede that various activities associated with the leasing stage would be subject to the consistency requirement of Section 307(c)(1). *Id.* at 26 n.19; U.S. Br. 37, 43. The two views are wholly incompatible.

Sections 307(c)(1) and 307(c)(3), properly read together, provide a sequential system of review to assure that activities affecting the coastal zone conform to state plans. In the early stages, the activities are federal, and are subject to the consistency requirement of Section 307(c)(1). After individual tracts are leased, the initiative for further action passes to the lessees, whose obligations are governed by Section 307(c)(3). This sequential scheme of review both recognizes that the identity of the responsible parties and the specificity of plans change over time, and provides continuing scrutiny to assure that consistency is maintained. But Congress has never said, or even suggested, that the existence of later stages of review obviates the need for earlier review as well.

It is thus not surprising that in 1980 Congress rejected the very argument now put forward by petitioners. While specifically addressing the question whether the 1976 amendments were intended to eliminate consistency review of lease sales under Section 307(c)(1), both the relevant House and Senate committees made clear that the Secretary must make leasing activities consistent with applicable coastal plans. The House Committee thus

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offshore plans." H.R. Rep. No. 1298, 94th Cong., 2d Sess. 30 (1976) (emphasis added). As we have sought to stress, however, decisions made by the Secretary regarding a lease sale have important consequences for the coastal zone wholly apart from the particular plans of each individual lessee. It is to the effect of those actions that Section 307(c)(1) is addressed.

stated flatly that the amendments to Section 307(c)(3) "did not alter Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980). Similarly, the Senate Report, after reviewing the legislative history of the 1976 amendment, reaffirmed that "[t]he Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307 (c)(1)." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Whatever petitioners may wish, none of the provisions relied upon relieve the Secretary of his obligations to make a consistency review under Section 307(c)(1). Respect for that obligation is essential to proper management of the coastal zone, and the Secretary should be required to honor it.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit construing the terms "directly affecting" in Section 307(c)(1) of the Coastal Zone Management Act of 1972 should be affirmed.

Respectfully submitted,

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v.

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Respondents.

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BRIEF OF *AMICUS CURIAE*, STATE OF NEW JERSEY

Interest of *Amicus Curiae*, State of New Jersey

This brief is submitted by the State of New Jersey in support of the State of California, *et al.*, respondents. The question presented for review, whether the final decision by the Department of the Interior to offer for lease a portion of the outer continental shelf ("OCS") off the coast of California for oil and gas exploration and development directly affects the coastal zone of California for purposes of Coastal Zone Management Act consistency requirements, is of vital interest to New Jersey.

New Jersey, like California, has a federally approved coastal zone management program and is located adjacent to an area of the OCS that has been and will be offered for oil and gas exploration and development leases. Pursuant to New Jersey's view of its rights under the consistency clause of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §1456(c)(1), the State has reviewed three lease sales off its coast for consistency with the New Jersey coastal management program. Those sales took place in December 1981 (Sale No. 59), August 1982 (Reoffer Sale No. 2), and April 1983 (Mid-Atlantic Offering or Sale No. 76). In its review New Jersey's principal concern has been to protect commercial and recreational uses of coastal and offshore fisheries which contribute approximately one billion dollars to the New Jersey economy.

Through consistency review New Jersey has addressed such issues as whether certain tracts should be deleted from a sale because of unreasonable risks of blowouts due to geo-hazards (certain geologically unstable tracts may be too dangerous for any oil or gas activities) or because fishery resources on particular tracts are so valuable and fragile that the harm from any oil and gas activities would outweigh the benefit of a possible find (submarine canyon head tracts with concentrations of geographically limited and vulnerable species such as tilefish, the State's leading commercial fish). New Jersey has also considered whether, for a lease sale to be consistent with the State's coastal management program, leases in areas of special biologic importance should be pre-conditioned upon requirements that lessees survey marine life prior to drilling so that their drilling plans can be designed to minimize adverse impacts to fishery resources.

In most instances New Jersey's consistency dialogue with Interior has concluded amicably in spite of Interior's posi-

tion that OCS leasing does not directly affect a state's coastal zone. However, an exception has been Reoffer Sale No. 2 ("RS-2"). Following Interior's refusal to delete seven canyon head and other vital fishery tracts from the sale and its refusal to precondition leases on another 16 tracts so as to require advance biological surveys, New Jersey brought suit in July 1982 in the United States District Court for the District of New Jersey to enjoin the leasing of 23 tracts out of the 155 offered in RS-2 which were located off the coast of the State. *Kean* v. *Watt,* Civil Action No. 82-2420. In an unreported oral decision of September 7, 1982, United States District Court Judge Dickinson R. Debevoise ruled that RS-2 would directly affect New Jersey's coastal zone and enjoined Interior from offering the 23 tracts in question until it had prepared a consistency determination as required by the CZMA. That judgment is new pending before the United States Court of Appeals for the Third Circuit under Docket No. 82-5679.

Clearly, the State of New Jersey has a paramount interest in ensuring that Interior prepare consistency determinations at the lease sale stage of the OCS oil and gas exploration process.

Summary of Argument

The Ninth Circuit correctly decided that the Department of the Interior's decision to offer certain tracts in the Santa Maria Basin for oil and gas exploration and development leasing directly affects the coastal zone of California within the meaning of CZMA Section 307(c)(1) consistency requirements. In reaching that decision the Ninth Circuit properly rejected Interior's view that an OCS lease sale does not directly affect the coastal zone because a lessee ordinarily may not engage in substantial physical activi-

ties under the lease until an exploration or other permit is received.

Instead, the Ninth Circuit held that the decision to offer for lease OCS lands does directly affect the coastal zone if the decision has a functional interrelationship from an economic, geographic or social standpoint with a state's coastal program, or if the decision initiates a series of events of coastal management consequence. That definition of "directly affecting" is in accord with any fair reading of the CZMA's language in light of the purpose of the entire act and the role of consistency in achieving that purpose. In addition, the Ninth Circuit's holding is solidly supported by the legislative history of the CZMA and by the interpretation that has been given to the act by its administering agency and by each court that has addressed the issue.

The position of Interior (and the oil and gas companies) is the characteristically headstrong and narrow view of an agency preoccupied with its primary mission—oil and gas leasing—at the expense of broader cooperative goals plainly expressed by Congress in the original 1972 version of the CZMA and strongly reiterated in the 1976 and 1980 amendments to that act. The reasonably foreseeable impacts from OCS activities on the coastal zone have been the express and studied topic of congressional action via the CZMA, and Interior's "not me" view of the duty of Federal agencies to act consistently to the maximum extent practicable with approved coastal management programs should be rejected as contrary to the intentions of Congress as set forth in the CZMA.

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ARGUMENT

The Ninth Circuit holding that Lease Sale 53 directly affects California's coastal zone and therefore requires the Department of Interior to perform a pre-leasing consistency determination under CZMA Section 307(c)(1) is supported by the meaning and purpose of the Act as decreed by Congress, the legislative history of the act, the longstanding interpretation of the act by its administering agency, and the judicial decisions on point.

The threshold question in CZMA-OCS consistency litigation has been whether a final decision by Interior to offer for lease a portion of the OCS for oil and gas exploration and development directly affects the coastal zone of an adjacent State for purposes of CZMA section 307(c)(1) consistency requirements. In the case of Lease Sale 53 it has been found that there is a 52% chance of an oilspill impacting the habitat of the sea otter; that 1.65 oil spills or more are expected during the life of the leases; that water quality will be degraded by activities such as pipelaying, drilling, chronic spills from platforms, and the discharge of sewage; that drilling muds and cuttings could significantly affect aspects of California's commercial fishery; that recreation areas could be disrupted by pipelaying; the competition for space by onshore support facilities and oilspills; that the coastal zone will experience employment and population changes; and that the gray whale could be harmed. See the opinions below, *California* v. *Watt*, 520 F. Supp. 1359, 1381 (C.D. Cal. 1981), aff'd in part, mod. in part, 683 F.2d 1254, 1260 (9th Cir. 1982), *cert.* granted, 51 *U.S.L.W.* 3818 (May 17, 1983).

It is in this setting that Interior has appealed from the ruling that CZMA consistency applies to Lease Sale 53. In

the Federal view the command of section 307(c)(1) that, "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs," does not apply because the direct effects reasonably foreseen from Lease Sale 53 cannot take place until exploratory drilling, development, or production permission is granted to a lessee by Interior. Therefore, Interior believes it need not examine the consistency of the basic decision to lease a portion of the OCS with an affected state's approved coastal management program; rather, it wants to leave consistency problems for lessee oil and gas companies to fight out with states on a tract-by-tract, plan-by-plan basis when they seek exploratory drilling or production-development approval.*

It is manifest from any fair reading of the CZMA statute in light of its purpose and the act's legislative history that Interior is wrong, seriously wrong, in its minimalist,

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* Interior and the oil and gas companies jealously seek to protect their dominance over the OCS by arguing that lease sale consistency review gives the states substantive rights that will result in endless litigation at the expense of finding new energy reserves. First, the record of OCS consistency litigation does not bear out this claim as in most instances only a few tracts out of hundreds offered have been at issue. More important, however, this argument is blind to the fact that by avoiding lease sale consistency review, consistency litigation will only be postponed until oil or gas companies apply for exploration permits. Then, instead of one suit such as California has brought regarding the 29 tracts at issue in Lease Sale 53, there is a potential for many separate suits as exploration permission is sought by different companies at different times. While advance consistency review does not preclude later litigation over specific permits, it certainly reduces that likelihood and thereby can hasten the nation's search for new fossil fuel energy sources.

hands off view of consistency. Indeed, Interior's position (and certainly the position of the oil and gas companies) is tantamount to saying that the CZMA does not apply to it, tantamount to saying that it need not cooperate with the states in carrying out their coastal management programs, and even tantamount to saying that it, as the public-trustee landlord of OCS land, can lease the land as it pleases without responsibility under the CZMA for the intended uses of the land. However, where, as here, the intended use of the land being leased can reasonably be expected to produce substantial impacts (both physical and socio-economic) upon an adjacent state's coastal zone, those substantial impacts are direct effects within the meaning of the CZMA, and the lease sale decision must be preceded by a consistency determination. The holding of the Ninth Circuit on this issue is in accord with all relevant legal principles of decision and with all judicial precedent on point, and it should be affirmed.

A. The purpose of the CZMA.

The fundamental purpose of the CZMA is to foster the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. §1451(a). The competing demands placed upon the coastal zone from, among other things, the extraction of fossil fuels was a stated concern of Congress when the CZMA was first enacted in 1972, 16 U.S.C. §1451(c), and over the years the concern expressed by Congress towards energy demands upon the coast, specifically OCS demands, has grown.

In particular, in a 1980 amendment to the CZMA Congress found that:

> "(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal,

> transportation, and industrial activities in the Great Lakes, territorial sea, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters;" 16 U.S.C. §1451(f).

The rationale for this and related amendments to the CZMA was explained by Congress in House Report No. 96-1012 as follows:

> "Additionally, as our national energy needs and the policies of the international petroleum market continue to diverge, it is clear that the frontier areas of the U.S. Outer Continental Shelf will be increasingly explored and developed for more domestic oil and gas production. The acceleration of OCS activity will have a profound impact on the coastal zone and will require, to a degree yet undetermined, further utilization of our Nation's coast for a variety of activities related to offshore development.
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> It is this rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act and it is the growing awareness that such balancing will be increasingly difficult in the years ahead that argues strenuously for the reauthorization of, and the improvements made to, the CZMA contained in H.R. 6979.
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> **The changes proposed in the bill are intended to advance the purposes of the act, without making major revisions in the requirements imposed on States. The bill recognizes the progress achieved to date by coastal States participating in the Federal coastal management program by reauthorizing the act to**

> insure that recently developed coastal zone management efforts in States and localities become fully established and accepted functions of their governments. H.R. 6979 is a progressive initiative. It seeks to institutionalize federally approved State programs that have been developed, and to foster management improvements during the new program implementation stage which are tied to new and specific national policy objectives." 1980 U.S. Code Cong. & Ad. News, p. 431.

Thus it has been clear since the inception of the CZMA that energy demands upon the coast, and in particular OCS demands, have been singled out by Congress as a special area of concern. As explained below, Congress intended the CZMA to achieve the national goal of "effective management, beneficial use, protection, and development of the coastal zone", through the broad use of state coastal zone management planning for energy impacts and through broad Federal cooperation with those plans via consistency. Interior, while it does not deny the letter of the CZMA, denies its spirit by downgrading the importance of the act to a mere bothersome distraction from its "real" mission under the Outer Continental Shelf Lands Act ("OCSLA"): leasing land. In Interior's view, and especially in the view of the oil and gas companies, the CZMA should be molded (perhaps broken) to the task of finding oil and gas. However important the goal of energy sufficiency, it does not justify the emasculation of the CZMA to achieve that end. It is Interior's operations under the OCSLA which, as explained *infra*, Congress has plainly stated should be consistent with approved coastal zone management programs.

B. The role of state coastal zone management programs and consistency requirements in carrying out the purpose of the CZMA.

The path selected by Congress to achieve sound coastal zone management and development has been to encourage states to develop coastal zone programs with the promise that the activities of Federal agencies directly affecting the coastal zone will be consistent with those programs. In specific, Congress has declared it to be national policy for states to include in their management programs an element which gives priority consideration for siting major facilities related to energy.* More particularly, in 1976 Congress made the inclusion of a planning element for OCS impacts mandatory. 16 U.S.C. §1454(b)(8) states:

> "(b) The management program for each coastal state shall include each of the following requirements:
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> • • •
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> (8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities."

See Senate Report No. 94-277 for a discussion of the range of OCS impacts to be addressed in a state's management program. 1976 U.S. Code Cong. & Ad. News, pp. 1778-87. In a companion 1976 amendment the Secretary of Commerce (the approval authority for coastal management programs) was directed to find that:

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* New Jersey's coastal program gives priority consideration to the siting of major energy facilities by encouraging the rapid exploration of the OCS as long as no long-term adverse impacts result such as unreasonable interference with fisheries resources. New Jersey Administrative Code 7:7E-7.4(c)(1) and 8.2(a).

> "(8) The management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program." 16 U.S.C. §1455(c)(8).

Once approval has been obtained, or once the management program includes policies which resolve the conflicts between OCS activities and a state's commercial and recreational interests in a manner compatible with national energy needs, all Federal agencies are commanded to cooperate and act consistently with that program. 16 U.S.C. §1456(c)(1).

C. The meaning of Section 307(c)(1) consistency requirements.

As shown above, Congress has declared it to be national policy and purpose for the "effective management, beneficial use, protection, and development of the coastal zone" to be achieved by state coastal program planning for OCS energy impacts. It is from this context that the meaning of "activities directly affecting the coastal zone" in section 307(c)(1) must be derived. New Jersey submits that the reasonably foreseeable impacts on the coastal zone from the intended use of an area offered for oil and gas leases are direct effects subjecting the decision to hold the lease sale to consistency requirements. New

Jersey further submits that this formulation clearly equates with the Ninth Circuit's holding.

First, it cannot be overstressed that state coastal zone programs and the weight they carry through consistency are the heart of the CZMA. The scope of Federal activities subject to section 307(c)(1) consistency is critical to achieving the congressional intentions stated in the act. To the extent that a narrow interpretation is given to consistency, to the extent that the CZMA is molded to accommodate strong willed Federal agencies preoccupied with their mission above all others, then to that extent, the fundamental purpose of the CZMA will be frustrated.

Second, the meaning that New Jersey ascribes to direct effects of a lease sale is supported by the legislative history of both the CZMA and OCSLA, is consistent with the longstanding interpretation placed upon the act by its administering agency, and is in accord with the position taken by each court that has analyzed the application of the CZMA to an OCS lease sale.

1. The legislative history behind consistency and lease sales.

The CZMA has been the subject of much congressional debate and study. Beginning in 1971 and continuing through the latest amendments to the CZMA in 1980, Congress has repeatedly taken a broad view of when a Federal agency must act consistently with an approved coastal management program. In particular, the 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to section 307(c)(1) as follows:

> "It is intended that any lands or waters under federal jurisdiction and control, within or adjacent

> to the coastal estuarine zone, where the administering federal agency determines them to have a *functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone,* should be administered consistent with approved state management programs." (Emphasis added. Senate Report No. 526, 92nd Cong., 1st Sess. 30 (1971).

In 1980, Congress reauthorized the CZMA, 94 Stat. 2060 (1980), and amended certain sections of the act, although the section 307 consistency provisions were not altered. However, at that time, Congress also recognized an uncertainty that had arisen concerning the interpretation of the threshold test of section 307(c)(1). House Report No. 96-1012. To resolve any such uncertainty, the House Report restated the 1971 formulation of the "functional interrelationship" test quoted above, and added this further clarification:

> "Generally all consistency provisions have been properly construed. The only uncertainty that has arisen concerns the interpretation of section 307(c)(1), the threshold test of 'directly affecting' the coastal zone. The committee points out that in the preamble to NOAA's Federal consistency regulations, this threshold test was considered during earlier congressional deliberations and was determined to apply whenever a Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies.
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> Under such circumstances, a State has a legitimate interest in reviewing a proposed Federal activity since the management program's policies are likely to apply to the activity. Thus, when a Federal agency

initiates a series of events of coastal management consequence, the intergovernmental coordination provisions of the Federal consistency requirements should apply.

The benefits of this system are significant. First, it fosters consultation between Federal and State agencies at the earliest practicable time. This, in turn, enhances the ability of the States to plan for and manage the coastal zone effects which are directly linked to Federal activities. It also allows Federal agencies to avoid the irretrievable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved State programs.

Second, broad opportunities for States to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary State participation in the national program. Finally, an expansive interpretation of the threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act.

In conclusion, the Coastal Zone Management Act of 1980 seeks to reinforce and promote the progress which States have made in resolving the struggles on their coasts." 1980 U.S. Code Cong. & Ad. News, pp. 4382-83.

Congress has thus made its intention to give a broad meaning to consistency abundantly clear. The threshold test for section 307(c)(1) consistency, "directly affecting", is satisfied whenever a Federal agency initiates a series of events of coastal management consequence. As NOAA had

noted,* this test is interchangeable with the "functional interrelationship" language which was first enunciated in the 1971 congressional deliberations, see 44 *Fed. Reg.* 37143 (1979), and which Congress reiterated in 1980.**

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* NOAA, the National Oceanic and Atmospheric Agency mentioned by Congress in House Report No. 96-1012, *supra*, is the arm of the Department of Commerce that administers the CZMA. NOAA historically took the position that Federal OCS lease sale decisions require a consistency determination, 44 *Fed. Reg.* 37142 (1979); Memorandum of General Counsel, Department of Commerce, Jan. 25, 1980, reprinted in 1980 U.S. Code Cong. & Ad. News, pp. 4415-18. It is extremely significant that when NOAA in 1981 suddenly sought to reverse this long-held position and to exempt OCS lease sales from the requirements of section 307(c)(1), resolutions of disapproval were immediately introduced in both Houses of Congress. NOAA promptly withdrew its new regulation, citing the negative reaction from Congress as well as the coastal states. 46 *Fed. Reg.* 50976 (1981). NOAA has also observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environment and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources.*" 44 *Fed. Reg.* 37142 (1979) (emphasis added). Thus, application of section 307(c)(1) at the lease sale stage may well lead to early resolution of problems rather than forcing a piecemeal and perhaps adversary resolution of conflicts with oil companies on a tract-by-tract basis under section 307(c)(3).

** Lacking support in the legislative history for its definition of "directly affecting", Interior has argued that the 1980 legislative history is after the fact and thus entitled to no weight. This argument, which is critical to Interior's position, ignores the fact that the "functional interrelationship" test is drawn from the 1971 legislative history. As explained below, the courts have properly concluded that the 1980 legislative history is entitled to substantial weight.

Faced with the obvious intent of Congress to give a broad meaning to direct effects and consistency, the Federal government, while admitting that section 307(c)(1) consistency can, in limited circumstances, apply to the decision to conduct a lease sale, in fact argues that the OCSLA amendments of 1978 and the CZMA amendments of 1976 exempt lease sales from consistency. However, the selected excerpts of legislative history cited by Interior are wide of the mark, and its view of the meaning of the 1976 CZMA amendments is wrong.

The 1978 amendments to the OCSLA do set forth a mechanism for state input into lease sale decisions. See 43 U.S.C. §1345(a). Interior argues that this is the proper route for state input into a lease sale rather than through CZMA consistency. However, while section 1345(d) allows a governor of an affected state to make recommendations as to the size, timing and location of a proposed lease sale, Interior has extremely wide latitude in deciding whether to accept the recommendations. In fact, this case readily underscores the difference in the constraints placed upon Interior by a governor's recommendations under the OCSLA and consistency under the CZMA. See the Ninth Circuit's opinion at 683 F.2d at 1268-69. There is little doubt why Interior and the oil and gas companies prefer the comfortable confines of the OCSLA for review of lease sale decisions rather than the measurement of such decisions by the "consistent to the maximum extent practicable" standard of the CZMA.

Fortunately, Congress did not implicitly or explicitly repeal the applicability of consistency to lease sales when it enacted 43 U.S.C. §1345. Rather than repudiating its long expressed concerns over OCS impacts on the coastal zone, Congress expressed its intent as follows when it enacted section 1345:

> "The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with 'consistency' requirements as to costal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan." Emphasis added. House Report No. 95-590, reprinted in 1978 U.S. Code Cong. & Ad. News, p. 1559, n. 52.

In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. §1866(a), which specifically provides that "nothing in the Act shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ." In short, the OCSLA and its legislative history explicitly confirm that the consistency requirements of the CZMA apply to OCS lease sales and that the OCSLA was not intended to change that result.

The above statements of Congress regarding the OCSLA are also in full accord with Congressional statements on the CZMA. In particular, Senate Report No. 96-783 regarding the 1980 amendments to the CZMA states:

> "The Department of Interior's activities which *preceded lease sales* were to remain subject to the requirements of section 307(c)(1). As a result, intergovernment coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of Interior sets in motion a series of events which

> has consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages." Emphasis added. Senate Report No. 783, 96th Cong., 2d Sess. 11 (1980)

The 1980 House Report also specifically made mention of the "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." House Report No. 96-1012, reprinted in 1980 U.S. Code Cong. & Ad. News, p. 4376.

These unequivocal statements from Congress in 1980 reiterates its earlier views. For example, the Senate Report accompanying its 1976 amendments to the CZMA noted that past difficulties arising from the lack of coordination between coastal states and Federal agencies prior to OCS lease sale decisions could be resolved by "[f]ull implementation of the Coastal Zone Management Act of 1972. . . ." Senate Report No. 96-277, reprinted in 1976 U.S. Code Cong. & Ad. News, p. 1770. Moreover, the Senate Report again concluded, with specific reference to Federal OCS activities, that "under the act as it presently exists . . . if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." *Id.* at 1805.

Despite the overwhelming weight of legislative history against its position, Interior attempts to bolster its view that the OCSLA should be given primacy over coastal zone management consistency requirements because of 1976 amendments to another CZMA consistency provision, section 307(c)(3) (U.S.C. §1456(c)(3)).

This argument, however, is a classic mixup of apples and oranges because while section 307(c)(1) addresses Federal agency activities which directly affect the coastal zone, section 307(c)(3) applies only to *applicants* for Federal li-

censes or permits. Thus, Interior's argument that since the word "lease" was not added to section 307(c)(3) in 1976, Federal leasing activities are somehow excluded from consistency coverage under section 307(c)(1), is meaningless.

The most that can be said of the history of section 307 (c)(3) is that the *applicant* for a Federal OCS lease, unlike an applicant for other Federal licenses or permits, does not have to engage in a consistency determination in order to get the lease. But, Congress has specifically stated that while the 1976 amendments to section 307(c)(3) removed "the need to examine individual leases under the general license and permit consistency section, [t]he change did not alter federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." House Report No. 96-1012, reprinted in 1980 U.S. Code Cong. & Ad. News, p. 4376; *see also* Senate Report No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress' decision in 1976 on whether an applicant for a lease of a particular tract need demonstrate consistency under section 307(c)(3) is thus entirely distinct from Congress' earlier decision in section 307(c)(1) that Interior should scrutinize for consistency its decision to commit an entire portion of the OCS to oil and gas activities. Perhaps leaving the evaluation of particular exploration or development plans on specific tracts to consistency review after a lease is signed is adequate for some purposes, but such piecemeal scrutiny of the nuts and bolts of OCS activities is no substitute for taking a hard look at the consistency of the basic decision to subject a state's coastal zone to the reasonably foreseeable impacts that will likely follow a lease sale. A finger-in-the-dike, after the fact role is not all that Congress intended for State coastal zone planning. What was intended was a careful review by Interior and affected states of the big picture beforehand, an

essential of sound planning, as well as a fine-tuned review of an oil company's specific tract-by-tract plans stemming from an already consistent lease sale proceeding.

2. The case law on consistency and lease sales.

Each of the courts (including the District Court and Circuit Court of Appeals in this case) that has examined the OCS lease sale consistency controversy has concluded that a lease sale directly affects the coastal zone within the meaning of section 307(c)(1). *Conservation Law Foundation* v. *Watt,* Civil Nos. 83-0506-MA and 83-530-MA (D. Mass., March 28, 1983), appeal pending in the First Circuit, Docket No. 83-1258; *Kean* v. *Watt,* Civil Action No. 82-2420 (D.N.J. September 7, 1982), appeal pending in the Third Circuit, Docket No. 82-5679; *California* v. *Watt,* 17 ERC 1711 (C.D. Cal. June 9, 1982). The cases cited by Interior for the contrary proposition simply do not deal with lease consistency obligations under the CZMA, but instead show only that Interior has successfully parried the thorough application of certain environmental protection statutes to its activities under the OCSLA. They consequently are not controlling here where the CZMA litigation to date, whether involving OCS activities or other Federal actions, has consistently recognized the strong role intended by Congress for federally approved coastal zone programs. See the cases cited above; *Cape May Greene, Inc.* v. *Warren,* 698 F.2d 179 (3d Cir. 1983) (obligation of EPA to act consistently with state land use decisions); *Puerto Rico* v. *Muskie,* 507 F. Supp. 1075, 1060 (D. Puerto Rico 1981) (obligation of federal goverment not to use army fort inconsistently with coastal program).

The reasoning of this line of cases should be affirmed by this Court and the leadership role intended by Congress for the CZMA in the area of state-federal coastal cooperation thereby upheld.

CONCLUSION

It is respectfully submitted that this Court affirm the holding of the Ninth Circuit which requires the Department of the Interior to perform a consistency determination as provided in section 307(c)(1) of the CZMA before conducting OCS lease sales because such sales "directly affect" the coastal zones of states with approved management programs.

Respectfully submitted,

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Dated: August 11, 1983

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No. 82-1326-CFX
Status: GRANTED

Title: Secretary of the Interior, et al., Petitioners
v.
California, et al.

Docketed:
February 8, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
82-1327
82-1511

Counsel for petitioner: Solicitor General

Counsel for respondent: Kase Jr.,Joseph, Berger,Theodora, Orr,Trent W., Beers,John Roger, Miller,William C.

Entry	Date	Note	Proceedings and Orders
1	Feb 8 1983	G	Petition for writ of certiorari filed.
2	Mar 11 1983		Brief of respondent State of California in opposition filed. VIDED.
3	Mar 16 1983		DISTRIBUTED. April 1, 1983
5	Apr 13 1983		Reply brief of petitioner filed.
6	Apr 20 1983		DISTRIBUTED. May 12, 1983
8	May 16 1983		Petition GRANTED. The case is consolidated with 82-1327 and 82-1511 and a total of one hour is allotted for oral argument.
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10	Jun 1 1983		Order extending time to file brief of petitioner on the merits until July 11, 1983.
11	Jul 11 1983		Joint appendix filed. VIDED.
12	Jul 11 1983		Brief of petitioners filed.
13	Jul 19 1983	G	Motion of Western Oil and Gas Association, et al. for divided argument filed.
14	Jul 28 1983	G	Motion of Humboldt County, et al. for divided argument filed.
15	Jul 18 1983		Record filed.
16	Jul 18 1983		13 volumnes of certified original record and C.A. proceedings received.
18	Aug 10 1983		Order extending time to file brief of respondent on the merits until August 20, 1983.
19	Aug 11 1983		Brief amicus curiae of Coastal States Organization, et al. filed. VIDED.
20	Aug 15 1983		Brief of respondent California filed. VIDED.
21	Aug 15 1983		Brief of respondents CA Counties of Hunboldt, et al filed. VIDED.
22	Aug 13 1983		Brief of respondents NRDC, Sierra Club, et al. filed. VIDED.
23	Aug 15 1983		Brief amicus curiae of New Jersey filed. VIDED.
24	Aug 15 1983		Brief amicus curiae of Alaska filed. VIDED.
25	Aug 30 1983		CIRCULATED.
26	Sep 8 1983		Motion of Western Oil and Gas Association, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
27	Sep 8 1983		Motion of Humboldt County, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
28	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 1, 1983. This case is consolidated with Nos. 82-1327 & 1511. (1st case)
29	Sep 21 1983		(1 hour argument)

No. 82-1326-CFX

Entry	Date	Note	Proceedings and Orders
30	Oct 13 1983	X	Reply brief of petitioners Watt, Sec. of the Interior, et al. filed.
31	Nov 1 1983		ARGUED.
32	Nov 2 1983		Lodging of Solicitor General filed.